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Working Papers

I

SUPREME COURT ADVISORY COMMITTEE

MAY 26 - 27, 1989 MEETING

AGENDA

1. Report on Suggested Pattern Local Rules: Luther H. Soules III

2. Report on n.r.e. designation: Rusty McMains

3. Report on Special Project on Family Law Section: Kenneth Fuller

4. Report on Special Project re: Code of Judicial Conduct: David J. Beck and Frank Branson

5. Report of Standing Subcommittee on Rules of Civil Evidence: Newell Blakely

6. Report of Standing Subcommittee on Rules of Appellate Procedure: Rusty McMains

7. Report of Standing Subcommittee on TRCP 1-14: Frank Branson or other committee person

8. Report of Standing Subcommittee on TRCP 15-166 including special report on Rule 51(b): David Beck

9. Report of Standing Subcommittee on TRCP 166b-215: Professor Dorsaneo

10. Report of Standing Subcommittee on TRCP 216-314: Professor Edgar

11. Report of Standing Subcommittee on TRCP 315-331: Harry Tindall

12. Report of Standing Subcommittee on TRCP 523-591: Anthony Sadberry

13. Report of Standing Subcommittee on TRCP 592-734: Steve McConnico

14. Report of Standing Subcommittee on TRCP 737-813: Professor Carlson

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BEXAR COUNTY COURTHOUSE REPORTERS ASSOCIATION
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205
(512) 220-2359

October 30, 1987

Dear Members of the San Antonio Bar Association:

For those of you who are actively engaged in the practice of civil or criminal trial law, the Bexar County Courthouse Reporters Association would like to bring to your attention an Order presently before the Supreme Court of Texas which, if signed into law, will implement the use of tape recorders in lieu of a live court reporter in the courts of record throughout the State of Texas. The members of the Bexar County Courthouse Reporters Association have discovered that most attorneys here in San Antonio are not aware of this proposed Order. Enclosed is a copy for your review.

Many of you have already had bad experiences in Federal Court with tape recorders. The possibilities of equipment malfunction, inaudibles, poorly prepared records are only a small portion of the problems that could occur.

The days of overnight excerpts while in trial would be over. An expedited record or "rush job" will be a thing of the past. Making a record on a default in a cubbyhole in our overcrowded courthouse would no longer be possible. Visiting judges would no longer be able to hold court in jury rooms. Calling on the reporter to read back a judge's ruling from a hearing two months prior would not be possible.

It is our interpretation from the reading of this proposed Order that a cassette tape will be the "statement of facts" on appeal. Nowhere in the Order is it provided that there will be a typewritten transcription of the tapes. Tape recorders will corrode our whole judicial process!

The Supreme Court of Texas has given the Texas Shorthand Reporters Association until November 5, 1987, to respond to said Order. Those of you who are concerned about the impact tape recorders would have on our appellate process and the absolute destruction of the quality of the record, we strongly urge you to write the Supreme Court of Texas before November 5, 1987, to voice your opposition.

For your convenience and due to the lack of time and urgency of the matter, we have enclosed an opposition form and self-addressed stamped envelope. Please respond before November 5, 1987. We thank you for your support.

Very truly yours,

Bexar County Courthouse
Reporters Association

Enclosures

00001

IN THE SUPREME COURT OF TEXAS

O R D E R

_____, 1987

IT IS HEREBY ORDERED that courts hearing civil matters may cause a record of proceedings to be made by an electronic recording system in accordance with this Order.

1. Application. This Order shall govern the procedures in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings. The presiding judge of any court using an electronic recording system shall ensure that such system is fully capable of making a complete, distinct, clear and transcribable recording.

2. Duties of Court Recorders. No stenographic record shall be required of any civil proceedings in which a record is made by electronic recording. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording

without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. Statement of Facts. The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. Time for Filing. The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. Appendix. Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to the specifications of the Supreme Court.

6. Presumption. The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. Supplemental Appendix. The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. Paupers. Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. Accuracy. Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. Costs. The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to the specifications prescribed by the Supreme Court.

11. Other Provisions. Except to the extent inconsistent with this Order, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SIGNED AND ENTERED IN DUPLICATE ORIGINALS this the ____ day of _____, 1987.

s/ John L. Hill
Robert M. Campbell
Franklin S. Spears
C. L. Ray
James P. Wallace
Ted Z. Robertson
William W. Kilgarlin
Raul A. Gonzalez
Oscar H. Mauzy

00004

October 30, 1987

THE HONORABLE JUSTICES OF THE
SUPREME COURT OF TEXAS
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Electronic Recording

Dear Honorable Justices:

In reference to the Supreme Court Order pending regarding the use of electronic recording devices in lieu of the live court reporter in the Courts of the State of Texas, I am respectfully informing you of my opposition.

ADDITIONAL COMMENTS:

_____

_____

_____

_____

_____.

Very truly yours,

_____

NAME:_____
TEXAS STATE BAR #_____

ADDRESS:_____

CITY & STATE:_____

ZIP:_____ PHONE:_____

LANEY LAW OFFICES

POST OFFICE DRAWER 800
600 ASH STREET
PLAINVIEW, TEXAS 79073-0800
806/293-2618

August 27, 1987

Mr. Luther H. Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, Texas 78701

Re: "n.r.e." Designation

Dear Mr. Soules:

I understand that you are the Chairman of the Supreme Court Advisory Committee, and therefore, I wanted to address a comment to you for consideration.

While I was at the Advanced Personal Injury Trial Course in Houston, I heard Justice Kilgarlin's talk in which he mentioned that after the first of the year, the designation "n.r.e." will take on a different meaning and mean totally different from what it has been for so many years. I am sure that you will agree that there is already a tremendous amount of confusion in the area of the practice of law, and if "n.r.e." is continued to be used as in the past, but mean something different, then of course it is going to cause additional confusion.

Is there any reason why a different designation could not be used for the cases after the date change, in which discretionary review is denied? For example, why could not a "d.r.d." (standing for - discretionary review denied) be used instead of "n.r.e."?

I assume that the matter has been discussed at length, but I think it would merit a re-discussion, and even to just simply use the word "grant" or "dismiss". There will obviously be confusion from changing the designation of "n.r.e.", and it will also be, apparently, an erroneous designation, since I understand that a case may contain reversible error, but writ may not be granted.

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Tina - To SCAC App. R. Subc & Agenda

MARK W. LANEY, P.C.
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J. PINK DICKENS

OF COUNSEL
JOHN MANN, P.C.
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TEXAS BOARD OF LEGAL
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Thank you for your consideration of my comments.

Very truly yours,

Mark W. Laney

MWL/dj

LHS Info Copy

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PHILIP D. HART, JR.

February 11, 1988

Mr. Luther Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, TX 78205

Dear Luther:

I would like to personally thank you
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I was recently contacted by Larry Praeger, a practicing attorney in Dallas regarding a possible amendment to the Family Code dealing with the expunction of records relating to a false allegation of child abuse. I took this matter to the Legislative Committee of the Family Law Section who took it under consideration. The Legislative Committee was of the opinion that it would be unwise to deal with the expunction or sealing of records only as it related to family law cases and more specifically with matters involving sexual abuse.

The sealing of records has been a hot topic in Dallas resulting in several court orders being questioned and the promulgation of some general admonissions against such action by our presiding judge. I am informed also that this subject is starting to rear its ugly head in several of the metropolitan areas.

The Legislative Committee of the Family Law Section was of the opinion that this was a matter which should be addressed by the Rules of Civil Procedure. I for one do not want to single out cases ivolving child abuse and take on the very emotionally involved group which has been involved in legislation in this area. Likewise, I feel that a rule of civil procedure could be drafted setting forth guidelines and procedures for the court to follow in the sealing of cases and the expunging of records in certain cases. There is a parallel procedure under the Criminal Law as pointed out by Mr. Praeger.

LHS - Info Copy

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WILLIAM V. DORSANEO, III
OF COUNSEL

+ LHS -

Cassie to Fuller as a Special Project and Agenda

February 11, 1988

Mr. Luther Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, TX 78205

Dear Luther:

I would like to personally thank you for your recent presentation on the 1988 rules changes to the family law section of the Dallas Bar Association. I have heard nothing but good comments.

I was recently contacted by Larry Praeger, a practicing attorney in Dallas regarding a possible amendment to the Family Code dealing with the expunction of records relating to a false allegation of child abuse. I took this matter to the Legislative Committee of the Family Law Section who took it under consideration. The Legislative Committee was of the opinion that it would be unwise to deal with the expunction or sealing of records only as it related to family law cases and more specifically with matters involving sexual abuse.

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I enclose Larry Praeger's memorandum to me with the attached copy of Article 55.02 of the Code of Criminal Procedure.

I would personally request that consideration of a rule dealing with these matters be put on the agenda for the next meeting of the Supreme Court Advisory Committee having to do with rules changes.

Again thank you very much for your hard work and sacrifice and working on the rules changes, and more particularly for taking the time to fly into Dallas in the dead of night, speak to us, skip dinner and run madly back to the airport. Hopefully the next time we meet we can take more time to visit.

Respectfully,

Kenneth D. Fuller

KDF/jlj

Enclosure

cc: Lawrence Praeger
Jack Sampson
Harry Tindall

PERINI & CARLOCK
ONE TURTLE CREEK VILLAGE, SUITE 300
OAK LAWN AT BLACKBURN
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MEMORANDUM

January 22, 1988

TO: Ken Fuller

FROM: Larry Praeger

RE: Expunction of records relating to a false allegation of child abuse

We have several cases pending on both the family and criminal sides of our law firm that have dealt with allegations of child abuse that have proven to be unfounded. Some of these cases have produced an arrest and a subsequent "No Bill" by the grand jury.

When a case is no-billed (and under certain other circumstances), a defendant is entitled to an expunction of records pursuant to Article 55, Texas Code of Criminal Procedure (a copy of the article is attached). The purpose of this law is obvious, it protects the innocent person from the opprobrium associated with evidence of criminal charges existing in public records.

These expunctions are granted routinely. After a brief hearing the Court orders that all records and files relating to the arrest be destroyed -- this includes court indices of cases filed.

I believe a person should have the same right to be free of records of a false allegation in a civil lawsuit that he/she does in criminal litigation.

An argument can be made that the Department of Human Services is an agency for the purpose of Article 55. However, in order to avoid lengthy litigation that would probably require an appellate court opinion, I think legislation should be enacted giving a person a right to expunge Department of Human Services records and court files in a suit affecting the parent child relationship under certain limited conditions.

Possible procedures:

1) Amend Article 55, Texas Code of Criminal Procedure to specifically include Department of Human Services investigations of child abuse.

2) In a suit affecting the parent-child relationship, authorize the clerk to obliterate all references to child abuse unless

the judge hearing the case makes an affirmative finding that the allegations are true.

3) Amend the Family Code to require that in all suits affecting the parent child relationship that contain an allegation of child abuse the files be automatically sealed unless the District Court directs otherwise.

4) Require the Department of Human Services to destroy its records unless:
   a) a criminal case is filed within a specified time; or
   b) the judge in the suit affecting the parent-child relationship makes an affirmative finding that the allegations are true.

5) Create a cause of action for an individual to sue the Department of Human Services for negligent disclosure of Department of Human Services information relating to any investigation.

These are just some ideas: The concept is to provide the same protection on the civil side of the docket that the expunction statute does on the criminal.

I will be happy to work with you on this in any way possible. I appreciate your interest and look forward to your comments.

changes in such procedure have been intentionally made. This Act shall be construed to be an independent Act of the Legislature, enacted under its caption, and the articles contained in this Act, as revised, rewritten, changed, combined, and codified, may not be construed as a continuation of former laws except as otherwise provided in this Act. The existing statutes of the Revised Civil Statutes of Texas, 1925, as amended, and of the Penal Code of Texas, 1925, as amended, which contain special or specific provisions of criminal procedure covering specific instances are not repealed by this Act.

(b) A person under recognizance or bond on the effective date of this Act continues under such recognizance or bond pending final disposition of any action pending against him.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

Art. 54.03. Emergency Clause

The fact that the laws relating to criminal procedure in this State have not been completely revised and re-codified in more than a century past and the further fact that the administration of justice, in the field of criminal law, has undergone changes, through judicial construction and interpretation of constitutional provisions, which have been, in certain instances, modified or nullified, as the case may be, necessitates important changes requiring the revision or modernization of the laws relating to criminal procedure, and the further fact that it is desirous and desirable to strengthen, and to conform, various provisions in such laws to current interpretation and application, emphasizes the importance of this legislation and all of which, together with the crowded condition of the calendar in both Houses, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and said Rule is hereby suspended, and that this Act shall take effect and be in force and effect from and after 12 o'clock Meridian on the 1st day of January, Anno Domini, 1966, and it is so enacted.

[Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.]

CHAPTER FIFTY-FIVE. EXPUNCTION OF CRIMINAL RECORDS

Article

Acts 1979, 66th Leg., p. 1333, ch. 604, which by § 1 amended this Chapter 55, provided in § 3:

"Any law or portion of a law that conflicts with Chapter 55, Code of Criminal Procedure, 1965, as amended, is repealed to the extent of the conflict."

Art. 55.01. Right to Expunction

A person who has been arrested for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if each of the following conditions exist:

(1) an indictment or information charging him with commission of a felony has not been presented against him for an offense arising out of the transaction for which he was arrested or, if an indictment or information charging him with commission of a felony was presented, it has been dismissed and the court finds that it was dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;

(2) he has been released and the charge, if any, has not resulted in a final conviction and, is no longer pending and there was no court ordered supervision under Article 42.13, Code of Criminal Procedure, 1965, as amended, nor a conditional discharge under Section 4.12 of the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes); and

(3) he has not been convicted of a felony in the five years preceding the date of the arrest.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.02. Procedure for Expunction

Sec. 1. (a) A person who is entitled to expunction of records and files under this chapter may file an ex parte petition for expunction in a district court for the county in which he was arrested.

(b) The petitioner shall include in the petition a list of all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any

political subdivision of this state and of all central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction.

Sec. 2. The court shall set a hearing on the matter no sooner than thirty days from the filing of the petition and shall give reasonable notice of the hearing to each official or agency or other entity named in the petition by certified mail, return receipt requested, and such entity may be represented by the attorney responsible for providing such agency with legal representation in other matters.

Sec. 3. (a) If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, it shall enter an order directing expunction and directing any state agency that sent information concerning the arrest to a central federal depository to request such depository to return all records and files subject to the order of expunction. Any petitioner or agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases. When the order of expunction is final, the clerk of the court shall send a certified copy of the order by certified mail, return receipt requested, to each official or agency or other entity of this state or of any political subdivision of this state named in the petition that there is reason to believe has any records or files that are subject to the order. The clerk shall also send a certified copy by certified mail, return receipt requested, of the order to any central federal depository of criminal records that there is reason to believe has any of the records, together with an explanation of the effect of the order and a request that the records in possession of the depository, including any information with respect to the proceeding under this article, be destroyed or returned to the court.

(b) All returned receipts received by the clerk from notices of the hearing and copies of the order shall be maintained in the file on the proceedings under this chapter.

Sec. 4. (a) If the state establishes that the petitioner is still subject to conviction for an offense arising out of the transaction for which he was arrested because the statute of limitations has not run and there is reasonable cause to believe that the state may proceed against him for the offense, the court may provide in its order that the law enforcement agency and the prosecuting attorney responsible for investigating the offense may retain any records and files that are necessary to the investigation.

(b) Unless the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested, the provisions of Articles 55.03 and 55.04 of this code apply to files and records retained under this section.

Sec. 5. (a) On receipt of the order, each official or agency or other entity named in the order shall:

(1) return all records and files that are subject to the expunction order to the court or, if removal is impracticable, obliterate all portions of the record or file that identify the petitioner and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

(b) The court may give the petitioner all records and files returned to it pursuant to its order.

(c) If an order of expunction is issued under this article, the court records concerning expunction proceedings are not open for inspection by anyone except the petitioner unless the order permits retention of a record under Section 4 of this article and the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested. The clerk of the court issuing the order shall obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.03. Effect of Expunction

After entry of an expunction order:

(1) the release, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision 3 of this article, the petitioner may deny the occurrence of the arrest and the existence of the expunction order; and

(3) the petitioner or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.04. Violation of Expunction Order

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

Art. 55.05. Notice of Right to Expunction

On release or discharge of an arrested person, the person responsible for the release or discharge shall give him a written explanation of his rights under this chapter and a copy of the provisions of this chapter.

[Acts 1977, 65th Leg., p. 1880, ch. 747, § 1, eff. Aug. 29, 1977. Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.]

CHAPTER 56. RIGHTS OF CRIME VICTIMS

Article

Art. 56.01. Definitions

In this chapter:

(1) "Close relative of a deceased victim" means a person who was the spouse of a deceased victim at the time of the victim's death or who is a parent or adult brother, sister, or child of the deceased victim.

(2) "Guardian of a victim" means a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.

(3) "Victim" means a person who is the victim of sexual assault, kidnapping, or aggravated robbery or who has suffered bodily injury or death as a result of the criminal conduct of another.

[Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985.]

Art. 56.02. Crime Victims' Rights

(a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

(1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;

(2) the right to have the magistrate take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;

(3) the right, if requested, to be informed of relevant court proceedings and to be informed if those court proceedings have been canceled or rescheduled prior to the event;

(4) the right to be informed, when requested, by a peace officer concerning the procedures in criminal investigations and by the district attorney's office concerning the general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements;

(5) the right to provide pertinent information to a probation department conducting a presentencing investigation concerning the impact of the offense on the victim and his family by testimony, written statement, or any other manner prior to any sentencing of the offender;

(6) the right to receive information regarding compensation to victims of crime as provided by the Crime Victims Compensation Act (Article 8309–1, Vernon's Texas Civil Statutes), including information related to the costs that may be compensated under that Act and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that Act, the payment of medical expenses under Section 1, Chapter 299, Acts of the 63rd Legislature, Regular Session, 1973 (Article 4447m, Vernon's Texas Civil Statutes), for a victim of a sexual assault, and when requested, to referral to available social service agencies that may offer additional assistance; and

(7) the right to be informed, upon request, of parole procedures, to participate in the parole process, to be notified, if requested, of parole proceedings concerning a defendant in the victim's case, to provide to the Board of Pardons and Paroles for

LAW OFFICES

SOULES & WALLACE

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ROBERT E. ETLINGER†
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SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

January 30, 198

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Code of Ju

Dear Mr. Beck:

Enclosed please find a copy of a
Justice William W. Kilgarlin regarding
Code of Judicial Conduct. I ask that
special attention regardless of whether
rules. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

Received via change

00015

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
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(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Code of Judicial Conduct

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding changes to Canon 5E of the Code of Judicial Conduct. I ask that you give this matter your special attention regardless of whether it is in the amid of your rules. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

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LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

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WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Code of Judicial Conduct

Dear Mr. Branson:

Enclosed please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding changes to Canon 5E of the Code of Judicial Conduct. I ask that you give this matter your special attention regardless of whether it is in the amid of your rules. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

00016

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
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Copy to LHS
Orig. to file
9-20-88 bjh

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 19, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, TX 78205

Dear Luke:

I doubt that the Advisory Committee has previously worked on the Code of Judicial Conduct. However, the two enclosed letters indicate there may be a need to re-examine Canon 5E of the Code.

I would like for the Advisory Committee to discuss these letters and make any recommendations it deems appropriate.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

00017

ROBERT J. SEERDEN
JUSTICE
THIRTEENTH COURT OF APPEALS

OFFICE
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401
(512) 888-0416

RESIDENCE
5050 MOULTRIE
CORPUS CHRISTI, TEXAS 78415
(512) 992-4715

September 6, 1988

Chief Justice Thomas R. Phillips and
Members of the Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

In re: Alternate Dispute Resolution

Dear Chief Justice Phillips:

It is my understanding that Code of Judicial Conduct is promulgated by the Supreme Court of Texas. The August issue of the Texas Center of the Judiciary's "In Chambers" newsletter contains two opinions from the committee on judicial ethics which I believe should be cause for great concern to all judges in the State of Texas.

The opinions are numbers 120 and 121 and deal with a district judge mediating or conducting settlement conferences either in his court or another judge's court. The committee is of the opinion that these activites are unethical as a violation of Canon 5E of the Code of Judicial Conduct which states that a judge should not act as an arbitrator or mediator.

If it is unethical for a judge of any court to promote or engage in settlement of cases, particularly where they involve cases in which he will not exercise any judicial function, then this rule should be changed. It is my opinion that a more practical interpretation of Canon 5E would be that it is limited to a commercial type of arbitration or mediation. This would seem to be more in keeping with the historical and practical role of judges in settlement proceedings and also is consistent with a position expressed by former Judge David H. Brown of Sherman, Texas, who now is a professional arbitrator. For your information, I enclose a copy of his letter of August 29, 1988, which demonstrates that lawyer-arbitrators, eliminated active judges as competitors in 1974.

Judges are uniquely qualified and trained as decision makers, as opposed to lawyers, in general, who are trained as advocates of a particular position. It is tragic to have these judicial skills possessed by dedicated individuals interested in the administration of justice wasted by this narrow interpretation of the canon of ethics.

This seems even more counter-productive at a time when the bar in general and the judiciary in particular is promoting alternative dispute resolution.

No less a prominent "legal journal" than Time magazine recently ran a news article concerning arbitration and the courts and voiced concern that with the rise in popularity of arbitration procedures might create a danger that the public court system could ultimately degenerate into a second class method of dispute resolution available only for lower income individuals or less important decisions. It would be tragic if our judicial system, the corner stone of our free and independent democratic society, were reduced to this level.

I am sending a copy of this letter and the enclosures to all of the members of the Supreme Court as well as the president of the State Bar with the request that appropriate action be taken to either rescind the action of the judicial ethics committee or to amend section 5E of the Canon of judical conduct to give it an interpretation consistent with the opinions expressed in this letter.

If I may do anything to assist in this effort, I would be most happy to do so.

Very truly yours,

Robert J. Seerden

RJS:dot
Enclosure
cc: Mr. Jim Sales, President of the State Bar
Members of the 13th Court of Appeals

DAVID H. BROWN
ARBITRATOR
223 NORTH CROCKETT
SHERMAN, TEXAS 75090
(214) 893-9454

August 29, 1988

Dear Judge:

For 50 years the Judicial Canons of Ethics of the American Bar Association specifically authorized an active judge to arbitrate and charge for his services. This was so because arbitration is a natural extension of a judicial career. In 1974 lawyer-arbitrators succeeded in eliminating active judges as competitors.

However, there is no legal or ethical proscription against former judges, senior judges or retired judges serving as impartial arbitrators. And it's a rewarding profession in every sense of the word. If you're planning on leaving the bench anytime soon you may want to look at your prospects of doing some arbitration. For a considerable length of time a number of my judicial colleagues have asked me to help them become arbitrators. Now, for the first time in my 22 years of arbitration, the situation is such that I earnestly believe there are prospects of early success for a substantial number of those with judicial experience to achieve that goal.

The field of arbitration is expanding, and there now is a real shortage of competent arbitrators. The best source of talent, in my opinion, are people with judicial experience, such as you. I believe I can help you considerably if you are interested.

From 2 to 5 P.M. on September 27, at the Hyatt-Regency Hotel in downtown Fort Worth I will present a program on How a Judge Becomes an Arbitrator. The registration fee is $100.00 and enrollment is limited. When we finish you should feel confident that you can handle an arbitration case, and reasonably hopeful that you will get the opportunity to do so. Bring a notebook. I will give you some information not for publication.

An application for enrollment with return envelope is enclosed.

Fraternally,

David

00020

(No. 119)

A. No. The various functions of the council and the name of the council itself indicate that the council is governmental in nature.

A statutory county court at law judge must comply with Canon 5G of the Code of Judicial Conduct which prohibits such judge from accepting an appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy matters other than the improvement of law, the legal system, or the administration of justice.

No. 120

Issued August 3, 1988

Q. Is it ethical for a district judge to mediate civil cases in order to expedite the settlement process?

A. The committee is of the opinion that a district judge may not mediate civil cases. Canon 3A(5) states, "A judge...shall not directly or indirectly initiate, permit, nor consider ex parte or *other communications* concerning the merits of a pending or impending judicial proceeding." (emphasis added) Furthermore, Canon 5E of the Code of Judicial Conduct states, "A judge should not act as an arbitrator or mediator." Canon 8 makes Canon 5E applicable to district judges. However, Canon 8 also lists other classifications of judges who are exempt from compliance with 5E.

No. 121

Issued August 3, 1988

Q. May a district judge conduct settlement conferences for suits filed (1) in his court, or (2) in another judge's court, where he only conveys settlement offers and asks questions? In the conference he sets no values, gives no opinions, and discloses no confidential information.

A. Although judges should encourage settlement negotiations, the described procedure appears to make the judge a mediator. Canon 5E of the Code of Judicial Conduct prohibits a judge from being a mediator. Also, Canon 3A(f) states, "A judge...shall not directly or indirectly initiate, permit, nor consider ex parte or *other communications* concerning the merits of a pending or impending judicial proceeding." (emphasis added)

The committee is of the opinion that the use of the settlement procedure outlined above by a district judge would be a violation of Canons 5E and 3A(5) of the code. Whether the litigation is filed in the judge's court or any other court makes no difference. The committee notes that Canon 5E is not applicable to all classifications of judges. *See,* Canon 8.

No. 122

Issued August 3, 1988

Q. Would it be a violation of Canon 5G of the Code of Judicial Conduct for a county court at law judge to serve as a member of the board of directors of a private agency which is established to oversee the operations of job-training, remedial education, summer youth employment programs, on-the-job training programs, etc., under a federal job training program?

Preface: The committee is advised that the board of directors decides which local agencies receive funding and in what amounts. The board of directors also has oversight and reporting duties and further generally designs and implements programs to insure that the money is spent wisely and effectively.

A. From the information furnished to the committee, the agency is a private, non-profit organization. Even though the agency implements programs funded by the federal government, the agency is not a governmental committee or commission; and therefore, the committee perceives no violation of Canon 5G of the Code of Judicial Conduct in serving on the board of directors of such agency. *See,* limitations set out in judicial ethics opinion No. 85.

No. 123

Issued August 3, 1988

Q. If a senior judge's wife becomes a member of a political action committee for a group of hospitals, does this in any manner constitute a violation of the Code of Judicial Conduct?

A. The code does not in any manner attempt to regulate the activities of a judge's spouse. Canon 2B does prohibit a judge from (1) allowing family members to influence his judicial conduct or judgement, (2) allowing others to use the prestige of his office (in this case his title) to advance their private interests, and (3) allowing others to convey the impression that they are in a special position to influence the judge.

Canon 2A admonishes judges to conduct themselves in a manner to promote public confidence, and Canon 3A(2) admonishes judges to be unswayed by partisan interests.

The committee perceives no violation of code if the senior judge's wife accepts the described appointment. However, if the judge perceives, in the acceptance of assignments, any impropriety or appearance of impropriety as a result of his or her spouse's appointments, refusal to accept such assignment or recusal after accepting the assignments would not be inappropriate.

PROPOSED JUDICIAL ETHICS COMMITTEE
OPINION NO. 124

Question:

Would a former district judge violate the code of judicial conduct by acting as an arbitrator or mediator?

Answer:

Canon 5E of the Code of Judicial Conduct Act states "A judge should not act as an arbitrator or mediator." However, a former district judge who has complied with the Court Administration Act, Art. 74.054(3) is placed by Canon 8G of the code in the same category as a senior judge. . .. Canon 8G(1) states, "[a former district judge]. . .is not required to comply with Canon 5E," but Canon 8G(2) qualifies this exception by stating "[A former district judge] . . . should refrain from judicial service during the period of extra-judicial appointment permitted by Canon 5G."

The committee is of the opinion that a former district judge who has qualified under Art. 74.054(3) may act as an arbitrator or mediator provided the judge refrains from performing judicial service during the period of an extra-judicial appointment.

FRANK G. EVANS
Chief Justice
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2715

May 16, 1989

Mr. Luther H. Soules, III
Soules & Reed
800 Milam Bldg.
San Antonio, TX 78205-1695

Dear Luke:

I find that I did not respond to your inquiry of January 25, 1989, concerning Texas Code of Judicial Conduct, Canon 5E, which provides that an active judge should not serve as a mediator or arbitrator.

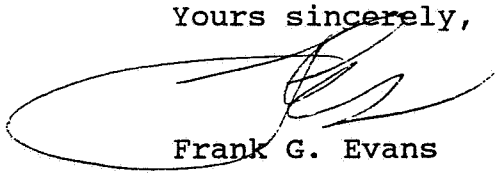
On balance, I think Canon 5E is probably an appropriate restraint. There is often a very fine line between a judge's role in encouraging settlement negotiations and the judge's active participation in such negotiations. Although the judge's active involvement may initiate more settlements, it may also result in coerced settlements. Even if the judge acts in utmost good faith, his or her actions may be perceived by litigants and their counsel as official meddling.

In my opinion, the Texas Alternative Dispute Resolution Procedures (Tex. Civ. Prac. & Rem. Code sec. 154.001 et seq.) establishes an appropriate role for active judges. The Act mandates both trial and appellate court judges to encourage early settlement of litigation; but when the judges accomplishes that purpose, his or her role is at an end. At that point, the mediator, arbitrator, or neutral conference facilitator begins, and it is best performed by persons who have special talent or expertise in that field.

The Texas Canons of Judicial Conduct do not prohibit a retired or former judge from serving as an arbitrator or a mediator. Canon 5D. This, I think, is as it should be, because the use of a retired judge to perform such a role does not have the negative aspects that apply to an active judge. Of course, if a retired judge is assigned to active duty to hear a particular case, the judge should be bound by the same provisions applicable to an active judge under Canon 5E.

My conclusion: the Texas Canons of Judicial Conduct do not preclude an active Texas judge, whether trial or appellate, from performing a very useful role in encouraging litigants and their counsel to use alternative dispute resolution procedures. Therefore, I feel there is no need for any change in the Code of Judicial Conduct.

Yours sincerely,



Frank G. Evans

FGE:cc

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBC
SUPREME COURT ADVIS

REQUEST FOR NEW RULE OR CHANGE OF
CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE
No change in any evidence rule
made to repeal Texas Rules of
See paragraph 4 below.

2. PROPOSED RULE: MARK THROUGH I

DASHES: UNDERLINE PROPOSED NE

3. CHANGED REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS
ADVANTAGES TO BE SERVED BY PRO

"I propose we repeal Rules 184
the end of each repealed rule stat
Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence."

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:

7. EVIDENCE SUBCOMMITTEE RECOMMENDATIONS:
No recommendation. No evidence changes are proposed. The subcommittee has no jurisdiction respecting [civil procedure] changes.

00025

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE:
No change in any evidence rule is proposed. A proposal is made to repeal Texas Rules of Civil Procedure 184 and 184a. See paragraph 4 below.

2. PROPOSED RULE: MARK THROUGH DELETIONS TO EXISTING RULE WITH DASHES: UNDERLINE PROPOSED NEW WORDING:

3. CHANGED REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"I propose we repeal Rules 184 and 184a with a comment at the end of each repealed rule stating Rule 184 has been added to Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence."

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:

7. EVIDENCE SUBCOMMITTEE RECOMMENDATIONS:
No recommendation. No evidence changes are proposed. The subcommittee has no jurisdiction respecting [civil procedure] changes.

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE:

Civil Practice and Remedies Code, Sec. 18.031. Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

2. PROPOSED RULE: MARK THROUGH DELETIONS TO EXISTING RULE WITH DASHES; UNDERLINE PROPOSED NEW WORDING:

Repeal section 18.031. Caveat: Mr. Tindall did not expressly propose repealer, but such appears to be the inference from his request for comment.

3. CHANGE REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGED AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed? I look forward to receiving your comments with respect to the above."

One senses that Harry may have in mind Evidence Rules 202 and 203 and the common law practice background, together as satisfying any evidence needs in this area. See in this connection Linda Addison's note (copy attached hereto), January 1989 Texas Bar Journal 74.

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

Will there be lawyers who will not recognize the availability of the judicial notice solution, as readily as the availability of the express language of 18.031?

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:

7. EVIDENCE SUBCOMMITTEE RECOMMENDATION:
The subcommittee makes no recommendation.

Judicial Notice of Laws Of Other States

Linda L. Addison

By Linda L. Addison

Question: ***How do I prove the law of another state?***

Answer: ***By judicial notice under (1) Texas Rule of Civil Evidence 202 or (2) Texas Rule of Civil Procedure 184.***

Question: ***How do I get a court to take judicial notice of the law of a foreign state?***

Answer: ***By giving the court sufficient information to enable it to do so.***

Texas Rule of Civil Evidence 202 permits a court to " . . . take judicial notice of the constitutions, statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States." Texas Rule of Civil Procedure 184 was amended, effective Jan. 1, 1988, to conform with Texas Rule of Civil Evidence 202.[1]

The court may take judicial notice of the law of another state on its own motion, or upon the motion of a party.[2] A party requesting that judicial notice be taken of the law of another state ". . . shall furnish the court sufficient information to enable it properly to comply with the request ..."[3]

"What constitutes 'sufficient information' must depend upon the circumstances, including the features of the libraries available to the particular judge to whom the motion is addressed. At a minimum, the law supporting the claims or defenses invoked should be particularly set forth, with accurate citations to cases, statutes, and constitutions."[4]

The Corpus Christi Court of Appeals recently considered what is "sufficient information to enable [the court to] properly comply with the request" for judicial notice in *Ewing v. Ewing*.[5] At issue in *Ewing* was whether appellant had provided the trial court with sufficient information to enable it to take judicial notice of California law.

Ewing concerned a former wife's entitlement to her ex-husband's military retirement benefits pursuant to a settlement agreement incorporated into a divorce decree issued in the state of California. On appeal, the wife complained that the trial court erred in failing to take judicial notice of the laws of California to interpret the divorce decree.

At trial, the wife had introduced the California judgment and the trial judge agreed to "take judicial notice of what is in it."[6] The wife argued on appeal that this was a sufficient request under Texas Rule of Civil Evidence 202 and Texas Rule of Civil Procedure 184 to require the court to take judicial notice not only of the decree, but of California law in general.

The Corpus Christi court disagreed. The court explained that this "supposed request certainly did not 'furnish the Judge sufficient information to enable him properly to comply with the request.'"[7] Nor did the request for judicial notice "set forth with some particularity the law that is to be relied upon."[8]

Remember that in the absence of evidence of the foreign state's law, the court presumes that the foreign state's law is the same as Texas law.[9] The *Ewing* court held that in the absence of a proper request to take judicial notice of California law, trial court was correct in presuming it to be the same as Texas law.[10]

1. Tex. R. Civ. P. 184, Comment to 1988 Change.
2. Tex. R. Civ. Evid. 202; Tex. R. Civ. P. 184.
3. *Id.* The party requesting judicial notice must give all parties notice of the request, so that the other parties may respond and/or request an opportunity to be heard on the motion. *Id.*
4. Goode, Wellborn and Sharlot, *Texas Practice, Guide to the Texas Rules of Evidence: Civil and Criminal* §202.1 (1988).
5. 739 S.W.2d 470 (Tex. App. — Corpus Christi, 1987, no writ).
6. *Id.* at 472.
7. *Id.*
8. *Id.*
9. *See, e.g., Freudenmann v. Clark and Associates, Inc.*, 599 S.W.2d 132, 135 (Tex. Civ. App. — Corpus Christi 1980, no writ).
10. 739 S.W.2d at 472.

A partner in the Houston law firm of Fulbright & Jaworski, Linda L. Addison has authored the Annual Survey of Texas Evidence Law *for the Southwestern Law Journal since 1982.*

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

HSH — 205 203

UNIVERSITY OF HOUSTON
LAW CENTER

January 13, 1989

Members of Standing Subcommittee on Rules of Evidence, Supreme Court Advisory Committee: Ms. Elaine Carlson, Mr. Franklin Jones, Jr., Mr. Gilbert I. Lowe, Mr. Steve McConnico, Mr. John M. O'Quinn, Hon. Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Anthony J. Sadberry.

Harry Tindall has recommended some changes in the Texas Rules of Civil Evidence. These are set out below.

Would you please vote for or against his proposals numbered 1,2, and the evidence aspect of 3.

The procedural part of proposal number 3 should be sent by him to the appropriate subcommittee. The same goes for proposal number 4.

Further, please add any arguments for or against 1, 2 and 3. Should your additions indicate the need, I will submit these proposals to you for reconsideration. Based on your vote, I will prepare the subcommittee's recommendation to the Advisory Committee.

Newell H. Blakely, Chairman
Evidence Subcommittee

cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

Mr. Harry Tindall

00028

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-3094
TELEPHONE (713) 229-8733
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HARRY L. TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA G. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION
*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

December 19, 1988

Newell Blakely
University of Houston Law Center
4600 Calhoun
Houston, Texas 77204-6371

Re: Proposals for amending Texas Rules of Civil Evidence and related rules

Dear Newell:

I am writing to make the following suggestions as amendments to the Texas Rules of Civil Evidence:

(1) I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recound a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion. Tex.R.Evid. 801, 802."

(2) I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new Subsection (12) to incorporate Section

18.001, Civil Practice and Remedies Code. Texas Rules of Civil Evidence, Rule 902(12) would read as follows:

Affidavit Concerning Cost and Necessity of Services

(a) Except to an action on a sworn account, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(b) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(c) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(d) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day

on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(e) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this form shall not be exclusive and an affidavit which substantially complies with the provisions of this rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are page(s) of records from _____. These said ____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record;

and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19__.

_____
Notary Public, State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10).

(3) I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

"The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

The present rule speaks of summoning interpreters and punishing them, which, of course, is never done in real practice. A comment

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Newell Blakely
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(5) Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed?

I look forward to receiving your comments with respect to the above.

Sincerely,

Harry L. Tindall

/ms

cc: Luther Soules

"The present rule speaks of summoning interpreters and punishing them, which, of course, is never done in real practice. A comment would also be added to Rule 604, Texas Rules of Civil Evidence, cross-referencing Rule 183."

H.T. PROPOSAL #4. (Calls for repeal of Rules 184 and 184a of Texas Rules of Civil Procedure)

For proposal. "I propose we repeal Rules 184 and 184a with a comment at the end of each repealed rule stating Rule 184 has been added to Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence."

H.T. PROPOSAL #5.

"Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed? I look forward to receiving your comments with respect to the above."

N.B.: 18.031. Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

Invitation to comment. One senses that Harry may have in mind Evidence Rules 202 and 203 and the common law practice background, together as satisfying any evidence needs in this area. See in this connection Linda Addison's note (copy attached hereto), January 1989 Texas Bar Journal 74.

Judicial Notice of Laws Of Other States

Linda L. Addison

By Linda L. Addison

Question: ***How do I prove the law of another state?***

Answer: ***By judicial notice under (1) Texas Rule of Civil Evidence 202 or (2) Texas Rule of Civil Procedure 184.***

Question: ***How do I get a court to take judicial notice of the law of a foreign state?***

Answer: ***By giving the court sufficient information to enable it to do so.***

Texas Rule of Civil Evidence 202 permits a court to " . . . take judicial notice of the constitutions, statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States." Texas Rule of Civil Procedure 184 was amended, effective Jan. 1, 1988, to conform with Texas Rule of Civil Evidence 202.[1]

The court may take judicial notice of the law of another state on its own motion, or upon the motion of a party.[2] A party requesting that judicial notice be taken of the law of another state ". . . shall furnish the court sufficient information to enable it properly to comply with the request ..."[3]

"What constitutes 'sufficient information' must depend upon the circumstances, including the features of the libraries available to the particular judge to whom the motion is addressed. At a minimum, the law supporting the claims or defenses invoked should be particularly set forth, with accurate citations to cases, statutes, and constitutions."[4]

The Corpus Christi Court of Appeals recently considered what is "sufficient information to enable [the court to] properly comply with the request" for judicial notice in *Ewing v. Ewing*.[5] At issue in *Ewing* was whether appellant had provided the trial court with sufficient information to enable it to take judicial notice of California law.

Ewing concerned a former wife's entitlement to her ex-husband's military retirement benefits pursuant to a settlement agreement incorporated into a divorce decree issued in the state of California. On appeal, the wife complained that the trial court erred in failing to take judicial notice of the laws of California to interpret the divorce decree.

At trial, the wife had introduced the California judgment and the trial judge agreed to "take judicial notice of what is in it."[6] The wife argued on appeal that this was a sufficient request under Texas Rule of Civil Evidence 202 and Texas Rule of Civil Procedure 184 to require the court to take judicial notice not only of the decree, but of California law in general.

The Corpus Christi court disagreed. The court explained that this "supposed request certainly did not 'furnish the Judge sufficient information to enable him properly to comply with the request.'"[7] Nor did the request for judicial notice "set forth with some particularity the law that is to be relied upon."[8]

Remember that in the absence of evidence of the foreign state's law, the court presumes that the foreign state's law is the same as Texas law.[9] The *Ewing* court held that in the absence of a proper request to take judicial notice of California law, trial court was correct in presuming it to be the same as Texas law.[10]

1. Tex. R. Civ. P. 184, Comment to 1988 Change.
2. Tex. R. Civ. Evid. 202; Tex. R. Civ. P. 184.
3. *Id.* The party requesting judicial notice must give all parties notice of the request, so that the other parties may respond and/or request an opportunity to be heard on the motion. *Id.*
4. Goode, Wellborn and Sharlot, *Texas Practice, Guide to the Texas Rules of Evidence: Civil and Criminal* §202.1 (1988).
5. 739 S.W.2d 470 (Tex. App. — Corpus Christi, 1987, no writ).
6. *Id.* at 472.
7. *Id.*
8. *Id.*
9. *See, e.g., Freudenmann v. Clark and Associates, Inc.*, 599 S.W.2d 132, 135 (Tex. Civ. App. — Corpus Christi 1980, no writ).
10. 739 S.W.2d at 472.

A partner in the Houston law firm of Fulbright & Jaworski, Linda L. Addison has authored the Annual Survey of Texas Evidence Law *for the Southwestern Law Journal since 1982.*

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTI
CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE.

Rule 604. An interpreter is sut these rules relating to qualificatior administration of an oath or affirmatior translation.

2. PROPOSED RULE: MARK THROUGH DELETI

DASHES: UNDERLINE PROPOSED NEW WOF

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Comment: See Rule 183, Texas Ru respecting appointment of interpret

Note: A condition precedent to the is the amendment of Rule 183, Texas Rules of Civil Procedure. See paragraph 4 below.

3. CHANGE REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

"The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE.

Rule 604. An interpreter is subject to the provision of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

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Comment: See Rule 183, Texas Rules of Civil Procedure, respecting appointment of interpreters.

Note: A condition precedent to the addition of this comment is the amendment of Rule 183, Texas Rules of Civil Procedure. See paragraph 4 below.

3. CHANGE REQUESTED BY:
Mr. Harry L. Tindall
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2801 Texas Commerce Tower
Houston, Texas 77002-3094

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"The present rule speaks of summoning interpreters and punishing them, which, of course, is never done in real practice. A comment would also be added to Rule 604, Texas Rules of Civil Evidence, cross-referencing Rule 183."

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:

7. EVIDENCE COMMITTEE RECOMMENDATION:
For the amendment 6-0. 3 members abstaining.
CAVEAT: [the evidence subcommittee did not consider the proposed change in rule 183, texas rules of civil procedure, that proposal being beyond it's jurisdiction;]

Table
Tomorrow

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

HJH — 604

UNIVERSITY OF HOUSTON
LAW CENTER

January 13, 1989

Members of Standing Subcommittee on Rules of Evidence, Supreme Court Advisory Committee: Ms. Elaine Carlson, Mr. Franklin Jones, Jr., Mr. Gilbert I. Lowe, Mr. Steve McConnico, Mr. John M. O'Quinn, Hon. Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Anthony J. Sadberry.

Harry Tindall has recommended some changes in the Texas Rules of Civil Evidence. These are set out below.

Would you please vote for or against his proposals numbered 1,2, and the evidence aspect of 3.

The procedural part of proposal number 3 should be sent by him to the appropriate subcommittee. The same goes for proposal number 4.

Further, please add any arguments for or against 1, 2 and 3. Should your additions indicate the need, I will submit these proposals to you for reconsideration. Based on your vote, I will prepare the subcommittee's recommendation to the Advisory Committee.

Newell H. Blakely, Chairman
Evidence Subcommittee

cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

Mr. Harry Tindall

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
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December 19, 1988

Newell Blakely
University of Houston Law Center
4600 Calhoun
Houston, Texas 77204-6371

Re: Proposals for amending Texas Rules of Civil Evidence and related rules

Dear Newell:

I am writing to make the following suggestions as amendments to the Texas Rules of Civil Evidence:

(1) I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

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(2) I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new Subsection (12) to incorporate Section

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AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are _____ page(s) of records from _____. These said ____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record;

and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19__.

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Notary Public, State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10).

(3) I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

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(4) I propose we repeal Rules 184 and 184a with a comment at the
Newell Blakely
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(5) Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed?

I look forward to receiving your comments with respect to the above.

Sincerely,

Harry L. Tindall

/ms

cc: Luther Soules

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19 .

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Notary Public, State of Texas

_____
Printed Name of Notary

_____
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For proposal. "I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new subsection (12) to incorporate Section 18.001, Civil Practice and Remedies Code. The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10)."

Against proposal. The rule would provide that the affidavit is sufficient to support a finding of fact. The rules of evidence deal with admissibility and not with sufficiency. To breach that line would certainly open floodgates. The progenitor of section 18.001 was article 3737h, and proposals for putting 3737h into the evidence rules have been rejected by both the Supreme Court Advisory Committee and the State Bar Committee on Administration of the Rules of Evidence. The line should be held barring sufficiency matters from the evidence rules.

H.T. PROPOSAL #3

Rule 604. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Comment: See Rule 183, Texas Rules of Civil Procedure, respecting appointment of interpreters.

For proposal. "I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

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H.T. PROPOSAL #4. (Calls for repeal of Rules 184 and 184a of Texas Rules of Civil Procedure)

For proposal. "I propose we repeal Rules 184 and 184a with a comment at the end of each repealed rule stating Rule 184 has been added to Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence."

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Invitation to comment. One senses that Harry may have in mind Evidence Rules 202 and 203 and the common law practice background, together as satisfying any evidence needs in this area. See in this connection Linda Addison's note (copy attached hereto), January 1989 Texas Bar Journal 74.

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
CIVIL EVIDENCE

1. EXACT WORDING OF EXISTING RULE:

Rule 614. Exclusion of Witnesses

At the request of a party the court sha excluded so that they cannot her the tes witnesses, and it may make the order of its rule does not authorize exclusion of (1) a part person or the spouse of such natural person, o employee of a party which is not a natural pe its representative by its attorney, or (presence is shown by a party to be essential t of his cause.

2. PROPOSED RULE: MARK THROUGH DELETIONS TO DASHES: UNDERLINE PROPOSED NEW WORDING:

Rule 614. EXCLUSION OF WITNESSES..

At the request of a party the court sh excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his or her cause. This rule ~~may be made~~ is not applicable to the discovery proceeding taking of an oral deposition, ~~(1) by agreement of all parties, or (2) by order of the court on its own motion, or on motion of a party, after notice to all parties and hearing.~~

3. CHANGE REQUESTED BY:
Mr. James L. Brister
Stubblefield, Brister & Schoolcraft

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL EVIDENCE

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3. CHANGE REQUESTED BY:
Mr. James L. Brister
Stubblefield, Brister & Schoolcraft

Sisk-Van Voorhis Professional Building
2117 Pat Booker Road, Suite A
Universal City, Texas 78148

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"The second situation which I have encountered on more than one occasion, is the taking of oral depositions in which other non-party witnesses are in attendance. Of course, the rule in a Court hearing allows the witnesses to be excluded. "The Rule" (Rule 614 of the Rules of Civil Evidence), in which the "Court" shall order witnesses excluded so that they cannot hear the testimony of other witnesses. However, there is no rule to provide direction in this situation. On the other hand, the non-party witnesses can read the deposition after it is transcribed. Should "the Rules" be made applicable to oral depositions to exclude non-party witnesses?"

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

Court has inherent power to order this on request. Further, as proposed does not "seal" the deposition. Accordingly, its effectiveness is questionable.

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:

Ragland: Delete "oral" so rule would apply to depositions on written questions, Rule 208, T.R.C.P.

Sadberry: Some form of additional protection (such as sealing the original, protective order against disclosure as in trade secrets situations, etc.) may be necessary; however, that could easily be incorporated in the court order if necessary.

7. EVIDENCE SUBCOMMITTEE RECOMMENDATION:
For the amendment, 4-2. 3 members abstaining.

LAW OFFICES

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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Re: Proposed Change to Rule 614, Texas Rules of Civil Evidence

Dear Professor Blakely:

Enclosed herewith please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rule 614. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

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SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 3, 1989

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Re: Proposed Change to Rule 614, Texas Rules of Civil Evidence

Dear Professor Blakely:

Enclosed herewith please find a copy of a letter sent to me by James L. Brister regarding proposed changes to Rule 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Mr. James L. Brister
Honorable Stanley Pemberton

00051

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February 1, 1989

Mr. Luther H. Soules III
Attorney at Law
175 E. Houston Street
Republic of Texas Plaza
Tenth Floor
San Antonio, Texas 78205

Re: Proposed changes in rules

Dear Mr. Soules:

As I was in attendance of your presentation on the current rules during the seminar at San Antonio, I noted your suggestion regarding notification of potential problems to you for your advisory committee to investigate and remedy, if possible.

Recently I have had two (2) separate situations in which the rules do not seem to cover.

The first is that of the filing or non-filing of responses to discovery. As you know, the current discovery rules require that Interrogatories and Request for Production not be filed with the District Clerk, whereas the Request for Admissions and responses thereto, under Rule 169, require that they shall "be filed promptly in the Clerk's office." However, I have experienced the situation where the party requesting discovery has included the Interrogatories, Production Request, and Admission Request, in the same document. Of course, by answering them in the same document, you have thus created the situation that, on the one hand, the rules will not allow the filing of the discovery request and responses, and on the other hand, the discovery rules require filing of the discovery request. It would seem that a solution to this problem would be to amend Rule 169 to say that Request for Admissions and responses thereto must be submitted separately for response and cannot be included in other discovery requests.

The second situation which I have encountered on more than one occasion, is the taking of oral depositions in which other non-party witnesses are in attendance. Of course, the rule in a Court hearing allows the witnesses to be excluded. "The Rule" (Rule 614 of the Rules of Civil Evidence), in which the "Court"

shall order witnesses excluded so that they cannot hear the testimony of other witnesses. However, there is no rule to provide direction in this situation. On the other hand, the non-party witnesses can read the deposition after it is transcribed. Should "the Rules" be made applicable to oral depositions to exclude non-party witnesses?

I am very interested in assisting the Bar and Bench in improving the Rules of Civil Procedure. Please advise how I might participate with your Advisory Group as a member.

Thank you very much for your help in this matter.

Sincerely,

JAMES L. BRISTER

JLB/lkm

Rule 703. Bases of Opinion Testimony

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Comment: This amendment conforms this rule of evidence with the rules of discovery in utilizing the word "reviewed."

Robert Unan

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SAVANNAH L. ROBINSON
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WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Change to Texas Rule of Civil Procedure 703

Dear Steve:

Enclosed herewith please a redlined version of Rule 703. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

00055

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SCAC SUBSCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY CC

REQUEST FOR NEW RULE OR CHANGE OF EXISTI
CIVIL EVIDENCE.

1. EXACT WORDING OF EXISTING RULE:
RULE 705. Disclosure of Facts or Opinion

The expert may testify in terms of give his reasons therefor without pr underlying facts or data, unless the (The expert may in any event disclose on (required to disclose on cross-examinat or data.

2. PROPOSED RULE: MARK THROUGH DELETI

DASHES: UNDERLINE PROPOSED NEW WOR

RULE 705. Disclosure of Facts Opinion. The expert may testify in term and give his reasons therefor withou underlying facts or data, unless the The expert may in any event ~~[disclose-o~~ be required to disclose ~~[on-cross--examination,]~~ the underlying facts or data on cross-examination.

Rule 705

Evan McLaurin

3. CHARGE REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose tot he jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the

SCAC SUBSCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL EVIDENCE.

1. EXACT WORDING OF EXISTING RULE:
RULE 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

2. PROPOSED RULE: MARK THROUGH DELETIONS TO EXISTING RULE WITH DASHES: UNDERLINE PROPOSED NEW WORDING:

RULE 705. Disclosure of Facts Or Data Underlying Expert Opinion. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event [~~disclose on direct examination, or~~] be required to disclose [~~on cross-examination,~~] the underlying facts or data on cross-examination.

3. CHARGE REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:

"I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose tot he jury on <u>direct</u> examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the

approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recount a hearsay conversation with a third person, even if the conversation forms part of the basis of his opinion. Tex. R. Evid. 801, 802."

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:

The jury must evaluate the expert's opinion. Its value is tied to its foundation. The more soundly grounded the opinion the more apt it is to persuade the jury. The calling party should be allowed to bring out the soundness of the foundation. The foundation facts or data need not be admissible if they are of the type reasonably relied upon by experts in that field. Rule 703 so states. Through discovery opponent knows what to expect from the expert. He can timely object to facts or data not meeting 703 requirements. If the foundation is altogether too weak, opponent can invoke 702, which requires that the opinion assist the jury, and thus keep out not only the facts or data, but the opinion as well.

See in this connection the GOODE, WELLBORN, SHARLOT analysis ATTACHED.

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:
Carlson: "Seems the problem supporting the amendment could be cured by pre-trial discovery and motion in limine if warranted."

7. EVIDENCE SUBCOMMITTEE RECOMMENDATION:
Against new rule 4-E. 3 members abstaining.

GOODE, WELLBORN, SHARLOT, 33 TEXAS PRACTICE (1988)

§ 705.3 Inadmissibility of Underlying Facts or Data

Under both Civil and Criminal Rule 705, an expert is entitled to disclose the facts and data that underlie his opinion. This allows the expert to explain why and how he reached his conclusion and enables the jury to assess more accurately the validity of the opinion. This is true even if the underlying facts and data would otherwise be inadmissible.[1] In the large majority of cases, disclosure is clearly beneficial and should routinely be permitted. In a small number of cases, however, courts may be required to exercise their discretion to limit the disclosure of otherwise inadmissible data.

Otherwise inadmissible evidence may be disclosed only for the limited purpose of explaining the basis for an expert's opinion and not as substantive evidence.[2] Ordinarily this distinction lacks practical significance. Occasionally, however, a party may attempt to use the otherwise inadmissible hearsay to support a finding regarding some other element of the case. This would be improper. For example, under the Family Code, parental rights may be involuntarily terminated only if the court finds both that termination is in the child's best interest and that the parent has engaged in certain statutorily-enumerated conduct, such as endangering the physical or mental well-being of the child.[3] In appropriate circumstances, an expert might be permitted to testify that termination would be in the child's best interest[4] and might base that opinion in part on assertions made to him by the child or others regarding the parent's conduct. These statements may be recited by the expert in an effort to explain the basis of his opinion. They could not be used as substantive evidence, however. That is, they could not be used to support a finding that the parent engaged in such conduct. Nor may otherwise inadmissible underlying data related by the expert as explanation for his opinion be used to support the judgment in a challenge to the sufficiency of the evidence.

§ 705.3

1. See § 703.3 supra.

2. See United States v. Wright, 783 F.2d 1091, 1100 (D.C.Cir.1986) (psychiatrist's recitation of what co-defendant had told him admissible to explain psychiatrist's diagnosis, but not for truth of what co-defendant said); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262–63 (9th Cir.1984) (audit reports inadmissible as proof of contribution deficiencies, but admissible for limited purpose of explaining basis of expert's opinion); United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir.1984) (court explicitly noted that hearsay statements were admitted only to show basis of expert's opinion and not as substantive evidence); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1356 (5th Cir.1983) ("An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion, • • • but not as general proof of the truth of the underlying matter • • • "). See also Lewis v. Southmore Savings Ass'n, 480 S.W.2d 180, 187 (Tex.1972) ("The expert's hearsay is not evidence of the fact but only bears on his opinion."); Travelers Ins. Co. v. Smith, 448 S.W.2d 541, 543–44 (Tex.Civ.App.—El Paso 1969, writ ref'd n.r.e.) (statement by deceased that he had been working on the job when severe pains commenced admissible for purpose of explaining physician's opinion, but not as evidence that deceased sustained injury in course of employment).

3. V.T.C.A., Family Code § 15.02.

4. E.g., Lane v. Jefferson Cty. Child Welfare Unit, 564 S.W.2d 130, 132 (Tex. Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

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Criminal Rule 705(d) addresses the problems posed by exposing the jury to otherwise inadmissible evidence that an expert has considered in formulating his opinion. It directs the court to balance the probative value of the underlying facts in explaining the opinion against the danger that the jury will use them for an improper purpose. If the danger of improper use outweighs their probative value, Criminal Rule 705(d) mandates their exclusion. The court may prohibit any mention whatsoever of the otherwise inadmissible underlying facts. Alternatively, the court may simply restrict the expert to a description of the types of underlying data upon which he relied.[5] Usually, however, a limiting instruction will suffice to negate the danger that the jury will improperly consider the inadmissible hearsay for its substantive purpose [6] and Criminal Rule 705(d) requires that one be given upon timely request.

Despite the absence of any comparable provision in Civil Rule 705, the authority and duty of the court to take such action pursuant to Rules 105(a) and 403 cannot be doubted.[7] Indeed, the Supreme Court recently stated that an expert ordinarily should not be permitted to relate hearsay conversations with third parties, even if such conversations formed part of the expert's opinion.[8] This language, contained in dictum and made without reference to Rules 703 and 705, is ill-considered and overbroad. The design of these rules was to allow experts to testify in a way consistent with the manner in which they conduct their professional activities. If an expert has relied upon hearsay in forming an opinion, and the hearsay is of a type reasonably relied upon by such experts, the jury should ordinarily be permitted to hear it. Exclusion is proper only when the court finds that the danger that the jury will improperly use the hearsay outweighs its probative value for explanatory purposes.

In a related vein, the court should not allow opposing counsel to use cross-examination as a means of bringing inadmissible hearsay or opinions before the jury. Although counsel must be permitted to conduct a thorough cross-examination, he may not use inadmissible hearsay reports or data of others to impeach the testifying expert when the expert did not rely on the material in question.[9]

5. Cf. Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 788–89, 174 Cal.Rptr. 348, 369 (1981) ("While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible.").

6. But see United States v. Wright, 783 F.2d 1091, 1101 (D.C.Cir.1986) ("in some instances, even the most carefully drafted limiting instructions directing the jury not to consider a statement for its truth will prove insufficient to protect a criminal defendant").

7. Cf. Almonte v. National Union Fire Ins. Co., 787 F.2d 763, 770 (1st Cir.1986) (trial court should not have allowed expert on arson to testify to hearsay statements upon which he relied in reaching conclusion that fire was caused by arson where statements went to question of who started fire rather than simply whether fire was deliberately set).

8. Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 365 (Tex.1987).

9. See Bobb v. Modern Products, Inc., 648 F.2d 1051, 1055–56 (5th Cir.1981) (trial

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HOUSTON, TEXAS 77004
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HJH — 705

UNIVERSITY OF HOUSTON
LAW CENTER

January 13, 1989

Members of Standing Subcommittee on Rules of Evidence, Supreme Court Advisory Committee: Ms. Elaine Carlson, Mr. Franklin Jones, Jr., Mr. Gilbert I. Lowe, Mr. Steve McConnico, Mr. John M. O'Quinn, Hon. Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Anthony J. Sadberry.

Harry Tindall has recommended some changes in the Texas Rules of Civil Evidence. These are set out below.

Would you please vote for or against his proposals numbered 1,2, and the evidence aspect of 3.

The procedural part of proposal number 3 should be sent by him to the appropriate subcommittee. The same goes for proposal number 4.

Further, please add any arguments for or against 1, 2 and 3. Should your additions indicate the need, I will submit these proposals to you for reconsideration. Based on your vote, I will prepare the subcommittee's recommendation to the Advisory Committee.

Newell H. Blakely, Chairman
Evidence Subcommittee

cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

Mr. Harry Tindall

00060

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
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HARRY L. TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA C. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION

*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

December 19, 1988

Newell Blakely
University of Houston Law Center
4600 Calhoun
Houston, Texas 77204-6371

Re: Proposals for amending Texas Rules of Civil Evidence and related rules

Dear Newell:

I am writing to make the following suggestions as amendments to the Texas Rules of Civil Evidence:

(1) I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recound a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion. Tex.R.Evid. 801, 802."

(2) I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new Subsection (12) to incorporate Section

18.001, Civil Practice and Remedies Code. Texas Rules of Civil Evidence, Rule 902(12) would read as follows:

Affidavit Concerning Cost and Necessity of Services

(a) Except to an action on a sworn account, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(b) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(c) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(d) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day

on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(e) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this form shall not be exclusive and an affidavit which substantially complies with the provisions of this rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are page(s) of records from _____. These said ____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record;

and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19__.

_____
Notary Public, State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10).

(3) I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

"The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

The present rule speaks of summoning interpreters and punishing them, which, of course, is never done in real practice. A comment

would also be added to Rule 604, Texas Rules of Civil Evidence, cross-referencing Rule 183.

(4) I propose we repeal Rules 184 and 184a with a comment at the
Newell Blakely
Page 5
December 19, 1988
end of each repealed rule stating Rule 184 has been added to Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence.

(5) Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed?

I look forward to receiving your comments with respect to the above.

Sincerely,

Harry L. Tindall

/ms

cc: Luther Soules

HARRY TINDALL's PROPOSALS FOR CHANGES IN THE TEXAS RULES OF CIVIL EVIDENCE

H.T. PROPOSAL #1.

Rule 705. Disclosure Of Facts Or Data Underlying Expert Opinion. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event ~~[disclose on direct examination, or]~~ be required to disclose ~~[on cross-examination,]~~ the underlying facts or data on cross-examination.

For proposal. "I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recount a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion. Tex. R.Evid. 801, 802." "

Against proposal. The jury must evaluate the expert's opinion. Its value is tied to its foundation. The more soundly grounded the opinion the more apt it is to persuade the jury. The calling party should be allowed to bring out the soundness of the foundation. The foundation facts or data need not be admissible if they are of the type reasonably relied upon by experts in that field. Rule 703 so states. Through discovery opponent knows what to expect from the expert. He can timely object to facts or data not meeting 703 requirements. If the foundation is altogether too weak, opponent can invoke 702, which requires that the opinion assist the jury, and thus keep out not only the facts of data, but the opinion as well.

See in this connection the GOODE, WELOBORN, SHARLOT analysis

attached at the back.

H.T. PROPOSAL #2.

Rule 902(12). Affidavit Concerning Cost and Necessity of Services

(a) Except to an action on a sworn account, and affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(b) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:
(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(c) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(d) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(e) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The

GOODE, WELLBORN, SHARLOT, 33 TEXAS PRACTICE (1988)

§ 705.3 Inadmissibility of Underlying Facts or Data

Under both Civil and Criminal Rule 705, an expert is entitled to disclose the facts and data that underlie his opinion. This allows the expert to explain why and how he reached his conclusion and enables the jury to assess more accurately the validity of the opinion. This is true even if the underlying facts and data would otherwise be inadmissible.[1] In the large majority of cases, disclosure is clearly beneficial and should routinely be permitted. In a small number of cases, however, courts may be required to exercise their discretion to limit the disclosure of otherwise inadmissible data.

Otherwise inadmissible evidence may be disclosed only for the limited purpose of explaining the basis for an expert's opinion and not as substantive evidence.[2] Ordinarily this distinction lacks practical significance. Occasionally, however, a party may attempt to use the otherwise inadmissible hearsay to support a finding regarding some other element of the case. This would be improper. For example, under the Family Code, parental rights may be involuntarily terminated only if the court finds both that termination is in the child's best interest and that the parent has engaged in certain statutorily-enumerated conduct, such as endangering the physical or mental well-being of the child.[3] In appropriate circumstances, an expert might be permitted to testify that termination would be in the child's best interest[4] and might base that opinion in part on assertions made to him by the child or others regarding the parent's conduct. These statements may be recited by the expert in an effort to explain the basis of his opinion. They could not be used as substantive evidence, however. That is, they could not be used to support a finding that the parent engaged in such conduct. Nor may otherwise inadmissible underlying data related by the expert as explanation for his opinion be used to support the judgment in a challenge to the sufficiency of the evidence.

§ 705.3

1. See § 703.3 supra.

2. See United States v. Wright, 783 F.2d 1091, 1100 (D.C.Cir.1986) (psychiatrist's recitation of what co-defendant had told him admissible to explain psychiatrist's diagnosis, but not for truth of what co-defendant said); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262–63 (9th Cir.1984) (audit reports inadmissible as proof of contribution deficiencies, but admissible for limited purpose of explaining basis of expert's opinion); United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir.1984) (court explicitly noted that hearsay statements were admitted only to show basis of expert's opinion and not as substantive evidence); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1356 (5th Cir.1983) ("An expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion, • • • but not as general proof of the truth of the underlying matter • • •"). See also Lewis v. Southmore Savings Ass'n, 480 S.W.2d 180, 187 (Tex.1972) ("The expert's hearsay is not evidence of the fact but only bears on his opinion."); Travelers Ins. Co. v. Smith, 448 S.W.2d 541, 543–44 (Tex.Civ.App.—El Paso 1969, writ ref'd n.r.e.) (statement by deceased that he had been working on the job when severe pains commenced admissible for purpose of explaining physician's opinion, but not as evidence that deceased sustained injury in course of employment).

3. V.T.C.A., Family Code § 15.02.

4. E.g., Lane v. Jefferson Cty. Child Welfare Unit, 564 S.W.2d 130, 132 (Tex. Civ.App.—Beaumont 1978, writ ref'd n.r.e.).

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Criminal Rule 705(d) addresses the problems posed by exposing the jury to otherwise inadmissible evidence that an expert has considered in formulating his opinion. It directs the court to balance the probative value of the underlying facts in explaining the opinion against the danger that the jury will use them for an improper purpose. If the danger of improper use outweighs their probative value, Criminal Rule 705(d) mandates their exclusion. The court may prohibit any mention whatsoever of the otherwise inadmissible underlying facts. Alternatively, the court may simply restrict the expert to a description of the types of underlying data upon which he relied.[5] Usually, however, a limiting instruction will suffice to negate the danger that the jury will improperly consider the inadmissible hearsay for its substantive purpose [6] and Criminal Rule 705(d) requires that one be given upon timely request.

Despite the absence of any comparable provision in Civil Rule 705, the authority and duty of the court to take such action pursuant to Rules 105(a) and 403 cannot be doubted.[7] Indeed, the Supreme Court recently stated that an expert ordinarily should not be permitted to relate hearsay conversations with third parties, even if such conversations formed part of the expert's opinion.[8] This language, contained in dictum and made without reference to Rules 703 and 705, is ill-considered and overbroad. The design of these rules was to allow experts to testify in a way consistent with the manner in which they conduct their professional activities. If an expert has relied upon hearsay in forming an opinion, and the hearsay is of a type reasonably relied upon by such experts, the jury should ordinarily be permitted to hear it. Exclusion is proper only when the court finds that the danger that the jury will improperly use the hearsay outweighs its probative value for explanatory purposes.

In a related vein, the court should not allow opposing counsel to use cross-examination as a means of bringing inadmissible hearsay or opinions before the jury. Although counsel must be permitted to conduct a thorough cross-examination, he may not use inadmissible hearsay reports or data of others to impeach the testifying expert when the expert did not rely on the material in question.[9]

5. Cf. Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 788–89, 174 Cal.Rptr. 348, 369 (1981) ("While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible.").

6. But see United States v. Wright, 783 F.2d 1091, 1101 (D.C.Cir.1986) ("in some instances, even the most carefully drafted limiting instructions directing the jury not to consider a statement for its truth will prove insufficient to protect a criminal defendant").

7. Cf. Almonte v. National Union Fire Ins. Co., 787 F.2d 763, 770 (1st Cir.1986) (trial court should not have allowed expert on arson to testify to hearsay statements upon which he relied in reaching conclusion that fire was caused by arson where statements went to question of who started fire rather than simply whether fire was deliberately set).

8. Birchfield v. Texarkana Mem. Hosp., 747 S.W.2d 361, 365 (Tex.1987).

9. See Bobb v. Modern Products, Inc., 648 F.2d 1051, 1055–56 (5th Cir.1981) (trial

EXCERPT FROM 3-16-89 LETTER FROM THOMAS BLACK, CHAIRMAN, STATE BAR COMMITTEE ON ADMINISTRATION OF RULES OF EVIDENCE, TO CHIEF JUSTICE PHILLIPS, REGARDING RULE 705.

Agenda item IV also included a proposal concerning Rule 705 of the Texas Rules of Civil Evidence set forth in the letter of Attorney Harry L. Tindall attached hereto under Item IV of the agenda. The Committee found that the concerns of Attorney Tindall would be satisfied by a recommendation that the Committee made to the courts following the 1988 meeting as follows:

Rule 705 of the Texas Rules of Civil Evidence should be amended as indicated below:

"(a) The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may ~~in any event~~ disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or

in any event

(b) When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court ~~shall~~ exclude the underlying facts or data if the danger that they will be used for an improper purpose substantially outweighs their probative value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction of the court shall be given upon request."

The Committee voted to re-urge this proposal.

SCAC SUBCOMMITTEE RECOMMENDATION

EVIDENCE SUBCOMMITTEE
SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF EVIDENCE

1. EXACT WORDING OF EXISTING RULE:
CIVIL PRACTICE AND REMEDIES CODE,

§18.001. 1. Affidavit Concerning Cost and Necessity of Services

(a) This section applies to civil actions only, but not to an action on a sworn account.

(b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

(c) The affidavit must:
(1) be taken before an officer with authority to administer oaths;
(2) be made by:
(A) the person who provide the service; or
(B) the person in charge of records showing the service provided and charge made; and
(3) include an itemized statement of the service and charge.

(d) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(e) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:
(1) not later than:
(A) 30 days after the day he received a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or
(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit an must be taken before a person authorized to

administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

2. PROPOSED RULE: MARK THROUGH DELETIONS TO EXISTING RULE WITH DASHES; UNDERLINE PROPOSED NEW WORDING:

~~Sec.--18.001.~~ Rule 902 (12). Affidavit Concerning Cost and Necessity of Services.

~~(a) This section applies to civil actions only, but not to be action on a sworn account. (b) Unless a controverting affidavit is filed as provided by this section,~~ Except to an action on a sworn account, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

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~~(d)~~ (c) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve with copy of the affidavit on

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(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this

each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

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(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this

form shall not be exclusive and an affidavit which substantially complies with the provision of this rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are _____ page(s) of records from _____. These said _____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____

Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19____.

_____
Notary Public, State of Texas

_____
Printed Name of Notary

_____
My Commission Expires:

---

3. CHANGE REQUESTED BY:
Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

4. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULE:
"I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new subsection (12) to incorporate Section 18.001, Civil Practice and Remedies Code. The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10)."

5. BRIEF STATEMENT OF ARGUMENTS AGAINST PROPOSED NEW RULE:
The rule would provide that he affidavit is sufficient to support a finding of fact. The rules of evidence deal with admissibility and not with sufficiency. To breach that line would certainly open floodgates. The progenitor of section 18.001 was article 3737h, and proposals for putting 3737h into the evidence rules have been rejected by both the Supreme Court Advisory Committee and the State Bar Committee on Administration of the Rules of Evidence. The line should be held barring sufficiency matters from the evidence rules.

6. ANY SPECIAL COMMENTS BY EVIDENCE SUBCOMMITTEE MEMBERS:
Low: ". . . I would certainly be interested in hearing arguments with regard to taking out a rule of civil procedure that has been a longstanding rule and relying on its counterpart in the Rules of Evidence."
O'Quinn: "The use of affidavits to make prima facie proof of the cost and necessity of services is welcomed addition to our law."

7. EVIDENCE SUBCOMMITTEE RECOMMENDATION:
For new rule 4-2. 3 members abstaining.

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

HSH — 902

UNIVERSITY OF HOUSTON
LAW CENTER

January 13, 1989

Members of Standing Subcommittee on Rules of Evidence, Supreme Court Advisory Committee: Ms. Elaine Carlson, Mr. Franklin Jones, Jr., Mr. Gilbert I. Lowe, Mr. Steve McConnico, Mr. John M. O'Quinn, Hon. Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Anthony J. Sadberry.

Harry Tindall has recommended some changes in the Texas Rules of Civil Evidence. These are set out below.

Would you please vote for or against his proposals numbered 1,2, and the evidence aspect of 3.

The procedural part of proposal number 3 should be sent by him to the appropriate subcommittee. The same goes for proposal number 4.

Further, please add any arguments for or against 1, 2 and 3. Should your additions indicate the need, I will submit these proposals to you for reconsideration. Based on your vote, I will prepare the subcommittee's recommendation to the Advisory Committee.

Newell H. Blakely, Chairman
Evidence Subcommittee

cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

Mr. Harry Tindall

00075

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HARRY L. TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA G. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION
*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

December 19, 1988

Newell Blakely
University of Houston Law Center
4600 Calhoun
Houston, Texas 77204-6371

Re: Proposals for amending Texas Rules of Civil Evidence and related rules

Dear Newell:

I am writing to make the following suggestions as amendments to the Texas Rules of Civil Evidence:

(1) I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recound a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion. Tex.R.Evid. 801, 802."

(2) I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new Subsection (12) to incorporate Section

18.001, Civil Practice and Remedies Code. Texas Rules of Civil Evidence, Rule 902(12) would read as follows:

Affidavit Concerning Cost and Necessity of Services

(a) Except to an action on a sworn account, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(b) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

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AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are _____ page(s) of records from _____. These said ____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record;

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"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19__.

_____
Notary Public, State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10).

(3) I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

"The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

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(5) Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed?

I look forward to receiving your comments with respect to the above.

Sincerely,

Harry L. Tindall

/ms

cc: Luther Soules

attached at the back.

H.T. PROPOSAL #2.

Rule 902(12). Affidavit Concerning Cost and Necessity of Services

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(2) with leave of the court, at any time before the commencement of evidence at trial.

(e) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The

counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this form shall not be exclusive and an affidavit which substantially complies with the provisions of this rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me dully sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are _____ page(s) of records from _____. These said _____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19 .

_____
Notary Public, State of Texas

_____
Printed Name of Notary

_____
My Commission Expires:

For proposal. "I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new subsection (12) to incorporate Section 18.001, Civil Practice and Remedies Code. The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10)."

Against proposal. The rule would provide that the affidavit is sufficient to support a finding of fact. The rules of evidence deal with admissibility and not with sufficiency. To breach that line would certainly open floodgates. The progenitor of section 18.001 was article 3737h, and proposals for putting 3737h into the evidence rules have been rejected by both the Supreme Court Advisory Committee and the State Bar Committee on Administration of the Rules of Evidence. The line should be held barring sufficiency matters from the evidence rules.

H.T. PROPOSAL #3

Rule 604. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Comment: See Rule 183, Texas Rules of Civil Procedure, respecting appointment of interpreters.

For proposal. "I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

> "The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

Copy to LHS

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 24, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, TX 78205

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

11/1
HJA,
R 72 Subc
also TRAP Subc
SCAC Agenda.

00084

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. <u>It used to be</u> that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

10-13-89

Randall E. Loomis | 713 893-6600

Loomis & Loomis Atty

707 FM 1960 West Ste 250

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John Dickson, Clerk 512 473-9437

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PART #108001 REV 9/87 PRINTED U.S.A. SRLE

0071

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

00088

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S . LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK I. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
JAN FERGUSON

900 CONGRESS AVENUE
P. O. DRAWER 1967
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

00094

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
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KENNETH W. ANDERSON
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CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

November 2, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

LHS Info Copy

STATE BAR OF TEXAS

Kelly -
McMain + TRAP
SCAC Suit C
Agenda

APPELLATE PRACTICE AND ADVOCACY SECTION

Friday, January 22, 1988

Please Reply to
P.O. Box 959
Lubbock, Texas 79408

Hon. Joe R. Greenhill
BAKER & BOTTS
98 San Jacinto Blvd.
Suite 1600
Austin, Texas 78701-4039

Dear Justice Greenhill:

Writing in the January, 1985 *Texas Bar Journal,* Judge Clarence A. Guittard observed that "[m]any of the differences between the practice in civil and criminal appeals have no logical or practical justification . . . ." His article reported on the work of an Advisory Committee on Appellate Rules that drafted proposed rules to bring civil and criminal appellate practice into harmony. The legislature gave rule-making authority to Court of Criminal Appeals, and that Court and the Supreme Court adopted a uniform set of rules governing posttrial, appellate and review in civil and criminal matters.

Although the Court of Criminal Appeals did not join in the Supreme Court's adoption of Rule 114, effective January 1, 1987, the general uniformity of the appellate rules did not begin to disappear until the adoption of recent amendments to the Rules, effective January 1, 1988. Specifically, while both courts adopted identical versions of Rules 53, 74, 121, 122, 131 and 136, they adopted slightly different versions of Rules 15a, 54 and 133. The Supreme Court also adopted amendments to Rules 13, 43, 47, 49, 52, 84, 85, 90, 140, and 182 which were not adopted at all by the Court of Criminal Appeals.

Rules 15a, 52, 54, and 90 are applicable both to civil and criminal appeals. The rest are applicable only to civil cases. The net result, however, is that *two different versions* each of Rules 13, 15a, 43, 47, 49, 52, 54, 84, 85, 90, 133, 140, and 182 exist side-by-side on the books. This is confusing to practitioners and compounds the likelihood of mistake and error.

Surely the two rule-making Courts can get together to rectify this situation and prevent it from happening again. I am writing to ask you, as Chairman of the Section's Committee on State Appellate Rules, to look into the matter to see if there is anything that your Committee or the Section can to do to facilitate their work.

Please let me know if I can be of any assistance.

Yours very truly,

Ralph H. Brock
RHB/

00097

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

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DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 28, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to the Rules of Appellate Procedure

Dear Rusty:

I have enclosed comments sent to me by Ralph H. Brock, Chairman of the Appellate Practice and Advocacy Section, regarding proposed changes to the Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice James P. Wallace

cc: Hon. James P. Wallace
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Hon. Sam H. Clinton
Texas Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

Hon. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
SOULES, REED & BUTTS
800 Milam Building
San Antonio, Texas 78205

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

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SUSAN C. SHANK
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W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 24, 1987

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to the Rules of Appellate Procedure

Dear Rusty:

I have enclosed comments sent to me through Justice James P. Wallace regarding proposed changes to the Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice James P. Wallace

LHS Info Copy

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

December 14, 1987

Holly - SCAC Subc + Cogsdale

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Dear Luke and Doak:

There is some feeling among members of the Court that the Supreme Court should promulgate a rule authorizing the current practice of ordering an unpublished court of appeals' opinion to be published in appropriate circumstances. Will you please have your appropriate subcommittees look at this matter.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

August 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
1000 Dallas Bldg.
Dallas, Tx 75201

Re: Texas Rules of Appellate Procedure

Dear Luke and Doak:

I am enclosing letters from Mr. Ronnie Pate of Midland, and Chief Justice Max N. Osborn of El Paso, recommending changes to the Texas Rules of Appellate Procedure.

Will you please place this matter on your Agenda for the next meeting so that they might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Ronnie Pate
Official Court Reporter
238th Judicial District Court
P. O. Box 1922
Midland, Tx 79702

Honorable Max N. Osborn
Chief Justice, Court of Appeals
Eighth Judicial District
500 City-County Building
El Paso, Texas 79901-2490

00102

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS

79901 · 2490
915 546-2240

Judge Wallace
What is your
views on this?
J.T.H.

July 27, 1987

Mr. Ronnie Pate
Official Court Reporter
238th Judicial District Court
P. O. Box 1922
Midland, Texas 79702

Dear Mr. Pate:

I am in receipt of your letter of July 16, 1987. I certainly understand your complaint about the Rules of Appellate Procedure. I attempted to address that issue very briefly in McKellips v. McKellips, 712 S.W.2d 540.

I am sending a copy of your letter to Chief Justice John Hill, and perhaps the committee which recommends changes in the Appellate Rules will further consider the problem caused by the present time schedule for filing a record in the Appellate Courts.

Sincerely,

Max N. Osborn

MNO:kem

✓ cc: Chief Justice John Hill

RONNIE PATE
Official Court Reporter
238th JUDICIAL DISTRICT COURT
P. O. BOX 1922
MIDLAND, TEXAS 79702

Phone 688-1140

July 16, 1987

Hon. Stephen F. Preslar, Chief Justice
Court of Appeals
Eighth District of Texas
500 City-County Building
El Paso, Texas 79901

Re: Preparation of Criminal Records under new Rules of Appellate Procedure

Sir:

I have just finished preparation of the Statement of Facts in a criminal case on appeal and this matter is fresh on my mind, so I'm writing to see if something might be done. I'm sure other Court Reporters are faced with the same problem.

Out of the 100 days allowed for the Statement of Facts to be filed, I was only given less than two weeks to prepare said SOF. The time for filing this particular transcript in the Court of Appeals was July 18, 1987. Written request for a Statement of Facts was prepared by appellant's attorney on July 6, 1987, which I believe I received on July 7th or 8th.

I think it is outrageous that out of 100 days, the attorneys are allowed to use this much of the time and then allow less than two weeks for the Court Reporter. There should be some cutoff so the reporter is allowed sufficient time for preparing transcripts without having to ask for an extension. It always appears to me to put reporters in a bad light to have to ask for extensions, and in most cases, if the attorney didn't wait until the last minute to notify the reporter, an extension would not be necessary, at least in my case.

If I had had any other work ahead of this appeal, I could not have completed it within the time limit under these circumstances without an extension, and I still had to work nights and over the weekend to complete.

Your consideration of this matter would be appreciated. Thank you.

Sincerely,
Ronnie Pate

00104

Appendix "A"

Rule 4. Signing, Filing and Service

(a) Signing...

(b) Filing. The filing of records in the appellate court as required by th by filing them with the clerk, except th court may permit the papers to be filed he shall note thereon the filing date ar transmit them to the office of the clerk rehearing, any matter relating to taking error from the trial court to any higher for writ of error or petition for discre the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~one day or more before~~ on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) ...

TRAP 4(c)

Unan. Approved

COAJ Recommends

Appendix "A"

Rule 4. Signing, Filing and Service

(a) Signing...

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~one day or more before~~ on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) ...

COAJ Recommends

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

APPELLATE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF ~~CIVIL~~ PROCEDURE.

ALTERNATE 1

I. Exact wording of existing Rule:

Rule 4

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 4

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~one day or more before~~ on the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing.

00106

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

ALTERNATIVE 2 APPELLATE

REQUEST FOR NEW RULE OR CHANGE OF ~~EXISTING RULE~~ – TEXAS RULES OF ~~CIVIL~~ PROCEDURE.

I. Exact wording of existing Rule:

Rule 4

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording

Rule 4

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service shall be prima facie evidence of the date of mailing. When the date of filing falls on a Saturday, a Sunday or a legal holiday, any paper filed by mail is mailed on time when it is deposited in the mail on the last date for filing the same, as extended in accordance with Appellate Rule 5(a).

00107

1/6
FYI -
Orsuda -
Xc Bill

January 31, 1989

Luther H. Soules III
Soules & Wallace
Republic of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205 2230

Re: Texas Rules of Appellate Procedure 4, 5 and 40

Dear Luke,

Enclosed please find proposals for amendment of Appellate Rules 4, 5 and 40 together with explanatory memoranda. Can these be added to the agenda for our May 26-27 meeting?

Best wishes,

Bill

William V. Dorsaneo, III

00108

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

TO : Members of Supreme Court Advisory Committee

FROM: William V. Dorsaneo III

DATE: January 30, 1989

The drafter's intent to draft Texas Rules of Appellate Procedure 4 and 5 in such a manner that the El Paso court's decision in Ector County Independent School District v. Hopkins, 518 S.W.2d 576, 583-584 (Tex. Civ. App. -- El Paso 1974, no writ) would be codified, has failed. That case holds that when the last day for filing falls on a Saturday, Sunday or a legal holiday, such that the item to be filed could be filed on "the next day," the item can be mailed on that day, notwithstanding the general rule that mailings must be done one day before the last date for filing.

When Tex. R. App. P. 5(a) was drafted, the following sentence was added at the end of paragraph (a) in order to accomplish this goal:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

This sentence has its own shortcomings ("neither a Saturday, Sunday nor legal holiday") and it is difficult to comprehend what it means when it is read in isolation from the remainder of the rule. Appellate specialists have been aware of these problems for some time. More recently an article has been published on the subject. See Davis , When is the Last Day the Next Day?, 51 Tex.B.J. 451 (May 1988). As Prof. Davis pointed out in his

article, these problems have caused two courts of appeals to interpret the sentence differently from what was intended. See Walkup v. Thompson, 704 S.W.2d 938 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.) (per curiam); Martin Hedrick Co. v. Gotcher, 656 S.W.2d 509, 510-511 (Tex. App. -- Waco 1983, writ ref'd n.r.e.).

The same troublesome issue also arose in a more recent case. Fellowship Missionary Baptist Ch. v. Sigel, 749 S.W.2d 186 (Tex. App. -- Dallas 1988, no writ). The Dallas court reasoned:

> If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish - deeming a filing timely if a document is deposited in the mail on the very day that it is due - rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish.

Id. at 187.

The foregoing cases indicate a fundamental dislike for the approach taken by the El Paso court in the Ector case. In fact, they demonstrate that a different approach to the problem is needed.

There are two possible solutions to the problem. The first approach that is the admittedly more far-reaching of the two would be a revision of Appellate Rule 4(b) in such a way as to remove the requirement that filing by mail be deposited "one day or more before the last day for filing same." See Tex. R. App. P. 4(b). This adjustment would simplify appellate procedure and would remove the inconsistency noted by the Dallas court in the

Appendix "B"

Rule 4. Signing, Filing and Service

(a) Signing....

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail ~~one day or for before~~ on the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c)...

LAW OFFICES

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(512) 224-7073

October 10, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 4 and 5

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by William V. Dorsaneo III regarding proposed changes to Appellate Rules 4 and 5. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to Liz
Orig to file
9/30/88 lja

10/9
HS H,
COAJ
SCAC Subc
Agenda

September 21, 1988

Luther H. Soules, III
Advisory Committee Liaison
Committee on Administration of Justice
800 Milam Building
San Antonio, Texas 78705

Judge Stanton B. Pemberton
Chairman
Committee on Administration of Justice
Bell County Courthouse
PO Box 747
Belton, Texas 76513-0969

Gentlemen,

Enclosed please find a memorandum concerning suggested revisions to Appellate Rules 4 and 5. I believe that the memorandum explains the need for amendments to these rules. The problem is best shown by reading the court's opinion in Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel, which is also appended to the memorandum.

Sincerely,

Bill

William V. Dorsaneo, III

00113

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

To: Members of Supreme Court Advisory Committee

From: William V. Dorsaneo III

Date: September 19, 1988

The draftmens' intent to draft Texas Rules of Appellate Procedure 4 and 5 in such a manner that the El Paso court's decision in Ector County Independent School District v. Hopkins, 518 S.W.2d 576, 583-584 (Tex. Civ. App. - El Paso 1974, no writ) would be codified, has failed. That case holds that when the last day for filing would fall on a Saturday, Sunday or a legal holiday, such that the item to be filed could be filed on "the next day," the item can be mailed on that day, notwithstanding the general rule that mailings must be done one day before the last date for filing.

When Tex. R. App. P 5(a) was drafted, the following sentence was added at the end of paragraph (a) in order to accomplish this goal.

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

This sentence has its own shortcomings ("neither a Saturday, Sunday nor legal holiday") and it is difficult to comprehend what it means when it is read in isolation from the preceding sentence (taken verbatim from Tex R. Civ. P.4). Please see appendix "A." Apparently, these and perhaps other problems have caused at least three courts of appeals to interpret the sentence differently

from what was intended. See Fellowship Missionary Baptist Ch. v. Sigel, 749 S.W.2d 186 (Tex. App. - Dallas 1988, no writ)("If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish - deeming a filing timely if a document is deposited in the mail on the very day that it is due - rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish."); Walkup v. Thompson, 704 S.W.2d 938 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.)(per curiam); Martin Hedrick Co. v. Gotcher, 656 S.W.2d 509, 510-511 (Tex. App.-Waco 1983, writ ref'd n.r.e.). These cases also indicate a fundamental dislike for the approach taken by the El Paso court in the Ector case. In fact, they demonstrate that a different approach to the problem is needed.

One approach to this problem would be removal of the quoted sentence from Appellate Rule 5(a) (together with some clerical adjustments as reflected in appendix "A") and the addition of the following sentence to the Appellate Rule 4(b).

> When the date of filing falls on a Saturday, a Sunday or a legal holiday, any paper filed by mail is mailed on time when it is deposited in the mail on the last date for filing the same, as extended in accordance with Appellate Rule 5(a).

Another approach that is admittedly more farreaching would be a revision of Appellate Rule 4(b) in such a way as to remove

the requirement that filing by mail be deposited "one day or more before the last day for filing same." See Tex.R.App.P.4(b). This adjustment would simplify appellate procedure and would remove the inconsistency noted by the Dallas court in the Fellowship Missionary case. Please see appendix "B" for the text of the court's opinion. A draft of this proposed revision Appellate Rule 4(b) is appended as appendix "C".

LLOWSHIP MISSIONARY BAPTIST CHURCH OF DALLAS, INC., et al., Appellants,

v.

Myrtle SIGEL, Appellee.

No. 05-87-01034-CV.

Court of Appeals of Texas, Dallas.

March 21, 1988.

Following a decision of the Second Probate Court, Dallas County, Robert E. Price, J., both parties appealed and sought to avoid paying costs. In support of its challenged application to appeal without paying cost, party mailed affidavit in support of its petition on Monday which followed the Saturday which was last day to personally serve court reporter with affidavit. The Court of Appeals, Baker, J., held that service was untimely; to have timely mailed affidavit, party was required to mail affidavit on Sunday, not Monday.

Appeal dismissed.

1. Time ⇐10(9)

When last day to personally serve court reporter with appeal documents falls on Saturday, in order to properly serve by mail, documents must be mailed on immediately following Sunday, not Monday. Rules App.Proc., Rules 4(b, e), 5(a), 40(a)(3)(B).

2. Time ⇐10(9)

Policy behind mailbox rule, allowing service of appellate materials on court reporter when last date of service falls on Saturday, by later mailing, was not to provide gratuitous extensions but to accommodate situation which courthouse employees are given a day off. Rules App.Proc., Rules 4(b), 5(a).

3. Evidence ⇐87, 89

Postmark on letter is only prima facie evidence of date of mailing, and in absence of postmark obtained on a Sunday, date of mailing can be established by affidavit. Rules App.Proc., Rules 4(b), 19(d).

4. Time ⇐10(9)

Party's service of affidavit with court reporter, in support of its motion to appeal without paying cost, by depositing it in United States mail on Monday, was insufficient compliance with rules of appellate procedure, where last day to serve affidavit personally on court reporter was previous Saturday, party was required to deposit affidavit in mail on Sunday to comply with rules. Rules App.Proc., Rules 4(b, e), 5(a), 40(a)(3)(B).

Eric V. Moye, Dallas, for appellants.

Harold Berman, Dallas, for appellee.

Before ENOCH, C.J., and BAKER and KINKEADE, JJ.

BAKER, Justice.

On the Court's own motion, we questioned whether we had jurisdiction over this appeal and requested the parties to brief the issue. We have considered the parties' arguments, and conclude that we do not have jurisdiction. Accordingly, we dismiss this appeal.

The trial court entered final judgment on July 20, 1987. Appellants Fellowship Missionary Baptist Church of Dallas, Inc., and its pastor, Reverend Sammie Davis (collectively the "Church"), filed an affidavit of inability to pay costs on August 13. The Church served the affidavit by depositing it in the United States mail on August 17. Appellee Myrtle Sigel filed a contest to the affidavit on August 24, and the trial court conducted a hearing on the contest. The trial court sustained the contest, but failed to enter a timely written order.

Accordingly, the allegations in the affidavit were deemed true by operation of law on September 3. TEX.R.APP.P. 40(a)(3)(E); *Alvarez v. Penfold*, 699 S.W.2d 619, 620 (Tex.App.—Dallas 1985, orig. proceeding). The question then is whether the Church sufficiently complied with rule 40(a)(3)(B) of the Texas Rules of Appellate Procedure so as to be permitted to prose-

cute this appeal without paying the costs or giving security therefor. That section states:

> The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

TEX.R.APP.P. 40(a)(3)(B). The Church filed its affidavit on August 13, a Thursday. It served Sigel by mailing the affidavit on August 17, a Monday. The question then becomes whether service of the August 13 affidavit on August 17 was timely. We hold that it was not.

Two days after August 13 was August 15, a Saturday. Therefore, the last day to serve the affidavit personally on the court reporter was August 17. TEX.R.APP.P. 5(a). In order to serve a party by mail, rule 4(b) requires that any document relating to taking an appeal shall be deemed timely filed[1] if it is "deposited in the mail one day or more before the last day" for taking the required action. TEX.R.APP.P. 4(b). However, rule 5(a) provides:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

TEX.R.APP.P. 5(a). The Church deposited its affidavit in the mail on the last day on which it could have served Sigel. If, however, rule 4 required it to deposit the affidavit in the mail on Sunday, August 16, the Church's service was not timely.

[1] There is a split of authority on this question. One court has held that rule 5(a), in similar circumstances, permits timely filing if the document is deposited in the mail on the Monday following the last day for filing that happened to fall on the weekend. *Ector County Independent School District v. Hopkins*, 518 S.W.2d 576, 583–584 (Tex.Civ.App.—El Paso 1974, no writ) (on mot. for reh'g). Two other courts, however, have held that the document was required to be deposited in the mail on the Sunday preceeding the Monday, in order to be timely. *Walkup v. Thompson*, 704 S.W.2d 938, *passim* (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.) (per curiam); *Martin Hedrick Co. v. Gotcher*, 656 S.W.2d 509, 510–11 (Tex.App.—Waco 1983, writ ref'd n.r.e.). The *Gotcher* Court specifically addressed the interaction between rules 4 and 5, and concluded that compliance with rule 4, by depositing a document in the mail one day before the last day of the period for taking action, was a "condition precedent" for triggering the extension provided by rule 5(a). 656 S.W.2d at 510. We agree with the *Gotcher* Court.

Rule 4(b) provides an extension of the deadline for taking required action, if that deadline would otherwise fall on a Saturday, Sunday, or legal holiday; in short, rule 4(b) creates an exception to the normal method of calculating due dates. Rule 5(a) also creates an exception for the timely receipt of a document relating to the taking of an appeal. If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceeding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish—deeming a filing timely if a document is deposited in the mail on the very day that it is due—rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish.

[2, 3] We note further that the policy behind rule 4(b), the "mailbox rule," is not to provide gratuitous extensions, but to accommodate situations in which courthouse employees are given a day off. *See Johnson v. Texas Employers' Insurance Association*, 668 S.W.2d 837, 838 (Tex.App.

1. We recognize that TEX.R.APP.P. 4(b) addresses the timeliness only of filing documents, and does not expressly address the timeliness of serving documents. The time to serve documents, however, is "at or before the time of filing." TEX.R.APP.P. 4(e). It necessarily follows that the same considerations in determining whether a document is timely filed apply in determining whether a document is timely served.

—El Paso, 1984), *rev'd on other grounds*, 674 S.W.2d 761 (Tex.1984). As mentioned earlier, the Church, but for rule 5(a), would have had to deposit its affidavit in the mail on Friday, August 14, in order to comply with rule 4(b). That it chose not to mail the affidavit on a business day does not excuse it from failing to mail the affidavit on a weekend day. Nor does it matter that the post office might not postmark a mailing deposited on a Sunday; the postmark is merely *prima facie* evidence of the date of mailing. TEX.R.APP.P. 4(b). In the absence of a postmark obtained on Sunday, the date of mailing can be established (as it indeed was in this case) by affidavit. TEX. R.APP.P. 19(d).

Finally, we note that both the *Walkup* case and the *Gotcher* case had subsequent histories in which the supreme court refused applications for writ of error with the annotation, no reversible error. We acknowledge that the annotation "n.r.e." is dubious when one attempts to extract any authoritative value from it. *See generally* Robertson and Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L.REV. 1, 30–41 (1986). Nevertheless, when a court dismisses a case for want of jurisdiction, its action is predicated on only one ground. Neither the *Walkup* nor the *Gotcher* Courts ever considered the merits of those cases. When the supreme court refused the writ applications with the "n.r.e." notation, the supreme court could not have been indicating that the intermediate courts reached the correct results but not necessarily by the correct rationales when only one rationale—lack of jurisdiction—supported the intermediate courts' actions. Further, the supreme court has corrected an intermediate court's erroneous rationale concerning its jurisdiction when the supreme court chose to do so. *See, e.g., Butts v. Capitol City Nursing Home*, 705 S.W.2d 696, 697 (Tex.1986) (per curiam).

We recognize that the supreme court has recently held that "[i]ndigency provisions, like other appellate rules, have long been liberally construed in favor of a right to appeal." *Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex.1987) (per curiam). Nonetheless, *Jones* is distinguishable from the instant case. In *Jones*, the indigent appellant mailed a letter to the court reporter the day after she filed her affidavit. The letter had been drafted before the affidavit was filed, and its wording indicated that the affidavit would be filed in the near future. The supreme court expressly noted that that letter, while "not a model of precision," was mailed within the two-day period mandated by rule 40(a)(3)(B), and that it "appear[ed] to sufficiently fulfill the purpose of the rule." 747 S.W.2d at 370. In the instant case, there is no dispute that the Church failed to mail its notice of its affidavit within the two-day period. There is a difference between substantial compliance with a rule, so as to fulfill its purpose, and failure to comply with a rule. To hold that depositing the notice required by rule 40(a)(3)(B) one day late were sufficient compliance with the rule, we would, in effect, be rewriting the rule; an appellant could be deemed to have complied with its requirements so long as the court reporter got notice of the affidavit with sufficient opportunity to contest it. We decline to do so. The appellant in *Jones* gave timely, if not altogether clear, notice that she had filed her affidavit; in this case, the Church did not give timely notice at all. We do not read *Jones* to be so broad as to exonerate an appellant's burden of complying with the applicable rules of procedure, so long as no harm results.

[4] We hold, therefore, that the Church's deadline to serve its affidavit was Monday, August 17, by operation of rule 5(a), but that the Church had to deposit its affidavit in the mail no later than Sunday, August 16, in order to make rule 4(b) applicable. Because the Church did not do so, its service of the affidavit was untimely and did not comply with the requirements of rule 40(a)(3)(B). Accordingly, the Church cannot prosecute this appeal without paying the costs thereof or giving security therefor.

We are left with two appellants who have perfected their appeal by filing an affidavit of inability to pay, but who are not entitled to prosecute their appeal with-

out paying the costs or posting security therefor. We recognize that the Church subsequently made a cash deposit in an attempt to preserve its appeal, but that cash deposit is a nullity. *See Shaffer v. U.S. Companies, Inc.*, 704 S.W.2d 411, 413 (Tex.App.—Dallas 1985, no writ). In any case, the cash deposit was made long after the time to perfect an appeal had expired. TEX.R.APP.P. 41(a)(1). Therefore, we have no alternative but to dismiss this appeal, and so order.

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

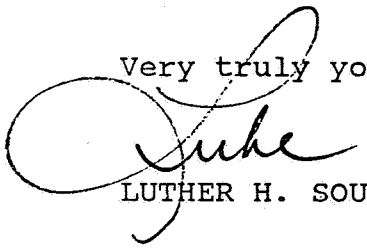
Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

Rule 5

(a) In General. In computing any pe
or allowed by these rules, by an order of
applicable statute, the day of the act, ev
which the designated period of time begins
not be included. The last day of the peri
shall be included, unless it is a Saturday
holiday, ~~as-defined-by-Article-4591,-Revis~~
which event the period ~~runs-until~~ extends
day which is ~~neither~~ not a Saturday, Sunda
holiday. ~~When-the-last-day-of-the-period-~~
~~is-neither-a-Saturday,-Sunday-nor-legal-ho~~
~~by-mail-as-provided-in-Rule-4-is-mailed-on~~
~~on-the-last-day-of-the-period~~.

TRAP 5(a)

Unan. Recom. for Amendment

CO DJ Recommends

Rule 5

(a) In General. In computing any period of time prescribed or allowed by these rules, by an order of the court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run ~~is not to~~ shall not be included. The last day of the period so computed ~~is to~~ shall be included, unless it is a Saturday, a Sunday or a legal holiday, ~~as defined by Article 4591, Revised Civil Statutes,~~ in which event the period ~~runs until~~ extends to the end of the next day which is ~~neither~~ not a Saturday, Sunday, ~~nor~~ or a legal holiday. ~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

Ok as Recommended

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

APPELLATE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 5

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday. When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 5

(a) In General. In computing any period of time prescribed or allowed by these rules, by an order of the court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run ~~is not to~~ shall not be included. The last day of the period so computed ~~is so~~ shall be included, unless it is a Saturday, a Sunday or a legal holiday, ~~as defined by Article 4591, Revised Civil Statutes~~, in which event the period ~~runs until~~ extends to the end of the next day which is ~~neither~~ not a Saturday, Sunday, ~~nor~~ or a legal holiday. ~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

00136

January 31, 1989

Luther H. Soules III
Soules & Wallace
Republic of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205 2230

Re: Texas Rules of Appellate Procedure 4, 5 and 40

Dear Luke,

Enclosed please find proposals for amendment of Appellate Rules 4, 5 and 40 together with explanatory memoranda. Can these be added to the agenda for our May 26-27 meeting?

Best wishes,

Bill

William V. Dorsaneo, III

00137

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

TO : Members of Supreme Court Advisory Committee

FROM: William V. Dorsaneo III

DATE: January 30, 1989

The drafter's intent to draft Texas Rules of Appellate Procedure 4 and 5 in such a manner that the El Paso court's decision in Ector County Independent School District v. Hopkins, 518 S.W.2d 576, 583-584 (Tex. Civ. App. -- El Paso 1974, no writ) would be codified, has failed. That case holds that when the last day for filing falls on a Saturday, Sunday or a legal holiday, such that the item to be filed could be filed on "the next day," the item can be mailed on that day, notwithstanding the general rule that mailings must be done one day before the last date for filing.

When Tex. R. App. P. 5(a) was drafted, the following sentence was added at the end of paragraph (a) in order to accomplish this goal:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

This sentence has its own shortcomings ("neither a Saturday, Sunday nor legal holiday") and it is difficult to comprehend what it means when it is read in isolation from the remainder of the rule. Appellate specialists have been aware of these problems for some time. More recently an article has been published on the subject. See Davis , When is the Last Day the Next Day?, 51 Tex.B.J. 451 (May 1988). As Prof. Davis pointed out in his

article, these problems have caused two courts of appeals to interpret the sentence differently from what was intended. See Walkup v. Thompson, 704 S.W.2d 938 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.) (per curiam); Martin Hedrick Co. v. Gotcher, 656 S.W.2d 509, 510-511 (Tex. App. -- Waco 1983, writ ref'd n.r.e.).

The same troublesome issue also arose in a more recent case. Fellowship Missionary Baptist Ch. v. Sigel, 749 S.W.2d 186 (Tex. App. -- Dallas 1988, no writ). The Dallas court reasoned:

> If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish - deeming a filing timely if a document is deposited in the mail on the very day that it is due - rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish.

Id. at 187.

The foregoing cases indicate a fundamental dislike for the approach taken by the El Paso court in the Ector case. In fact, they demonstrate that a different approach to the problem is needed.

There are two possible solutions to the problem. The first approach that is the admittedly more far-reaching of the two would be a revision of Appellate Rule 4(b) in such a way as to remove the requirement that filing by mail be deposited "one day or more before the last day for filing same." See Tex. R. App. P. 4(b). This adjustment would simplify appellate procedure and would remove the inconsistency noted by the Dallas court in the

Appendix "A"

In computing any period of time prescribed or allowed by these rules, by an order of the court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period ~~so computed is to~~ shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period extends to the end of the next day which is ~~neither~~ not a Saturday, Sunday, ~~nor~~ or a legal holiday.

~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 4 and 5

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by William V. Dorsaneo III regarding proposed changes to Appellate Rules 4 and 5. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to all
Orig to file
9/30/88 bjs

September 21, 1988

10/9
HS H,
COAJ
SCAC Subc
Agenda

Luther H. Soules, III
Advisory Committee Liaison
Committee on Administration of Justice
800 Milam Building
San Antonio, Texas 78705

Judge Stanton B. Pemberton
Chairman
Committee on Administration of Justice
Bell County Courthouse
PO Box 747
Belton, Texas 76513-0969

Gentlemen,

Enclosed please ~~find~~ a memorandum concerning suggested revisions to Appellate Rules 4 and 5. I believe that the memorandum explains the need for amendments to these rules. The problem is best shown by reading the court's opinion in Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel, which is also appended to the memorandum.

Sincerely,

Bill

William V. Dorsaneo, III

00142

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

To: Members of Supreme Court Advisory Committee

From: William V. Dorsaneo III

Date: September 19, 1988

The draftmens' intent to draft Texas Rules of Appellate Procedure 4 and 5 in such a manner that the El Paso court's decision in Ector County Independent School District v. Hopkins, 518 S.W.2d 576, 583-584 (Tex. Civ. App. - El Paso 1974, no writ) would be codified, has failed. That case holds that when the last day for filing would fall on a Saturday, Sunday or a legal holiday, such that the item to be filed could be filed on "the next day," the item can be mailed on that day, notwithstanding the general rule that mailings must be done one day before the last date for filing.

When Tex. R. App. P 5(a) was drafted, the following sentence was added at the end of paragraph (a) in order to accomplish this goal.

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

This sentence has its own shortcomings ("neither a Saturday, Sunday nor legal holiday") and it is difficult to comprehend what it means when it is read in isolation from the preceding sentence (taken verbatim from Tex R. Civ. P.4). Please see appendix "A." Apparently, these and perhaps other problems have caused at least three courts of appeals to interpret the sentence differently

from what was intended. See Fellowship Missionary Baptist Ch. v. Sigel, 749 S.W.2d 186 (Tex. App. - Dallas 1988, no writ)("If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish - deeming a filing timely if a document is deposited in the mail on the very day that it is due - rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish."); Walkup v. Thompson, 704 S.W.2d 938 (Tex. App.-Corpus Christi 1986, writ ref'd n.r.e.)(per curiam); Martin Hedrick Co. v. Gotcher, 656 S.W.2d 509, 510-511 (Tex. App.-Waco 1983, writ ref'd n.r.e.). These cases also indicate a fundamental dislike for the approach taken by the El Paso court in the Ector case. In fact, they demonstrate that a different approach to the problem is needed.

One approach to this problem would be removal of the quoted sentence from Appellate Rule 5(a) (together with some clerical adjustments as reflected in appendix "A") and the addition of the following sentence to the Appellate Rule 4(b).

> When the date of filing falls on a Saturday, a Sunday or a legal holiday, any paper filed by mail is mailed on time when it is deposited in the mail on the last date for filing the same, as extended in accordance with Appellate Rule 5(a).

Another approach that is admittedly more farreaching would be a revision of Appellate Rule 4(b) in such a way as to remove

the requirement that filing by mail be deposited "one day or more before the last day for filing same." See Tex.R.App.P.4(b). This adjustment would simplify appellate procedure and would remove the inconsistency noted by the Dallas court in the Fellowship Missionary case. Please see appendix "B" for the text of the court's opinion. A draft of this proposed revision Appellate Rule 4(b) is appended as appendix "C".

:LLOWSHIP MISSIONARY BAPTIST CHURCH OF DALLAS, INC., et al., Appellants,

v.

Myrtle SIGEL, Appellee.

No. 05-87-01034-CV.

Court of Appeals of Texas, Dallas.

March 21, 1988.

Following a decision of the Second Probate Court, Dallas County, Robert E. Price, J., both parties appealed and sought to avoid paying costs. In support of its challenged application to appeal without paying cost, party mailed affidavit in support of its petition on Monday which followed the Saturday which was last day to personally serve court reporter with affidavit. The Court of Appeals, Baker, J., held that service was untimely; to have timely mailed affidavit, party was required to mail affidavit on Sunday, not Monday.

Appeal dismissed.

1. Time ⇐10(9)

When last day to personally serve court reporter with appeal documents falls on Saturday, in order to properly serve by mail, documents must be mailed on immediately following Sunday, not Monday. Rules App.Proc., Rules 4(b, e), 5(a), 40(a)(3)(B).

2. Time ⇐10(9)

Policy behind mailbox rule, allowing service of appellate materials on court reporter when last date of service falls on Saturday, by later mailing, was not to provide gratuitous extensions but to accommodate situation which courthouse employees are given a day off. Rules App.Proc., Rules 4(b), 5(a).

3. Evidence ⇐87, 89

Postmark on letter is only prima facie evidence of date of mailing, and in absence of postmark obtained on a Sunday, date of mailing can be established by affidavit. Rules App.Proc., Rules 4(b), 19(d).

4. Time ⇐10(9)

Party's service of affidavit with court reporter, in support of its motion to appeal without paying cost, by depositing it in United States mail on Monday, was insufficient compliance with rules of appellate procedure, where last day to serve affidavit personally on court reporter was previous Saturday, party was required to deposit affidavit in mail on Sunday to comply with rules. Rules App.Proc., Rules 4(b, e), 5(a), 40(a)(3)(B).

Eric V. Moye, Dallas, for appellants.

Harold Berman, Dallas, for appellee.

Before ENOCH, C.J., and BAKER and KINKEADE, JJ.

BAKER, Justice.

On the Court's own motion, we questioned whether we had jurisdiction over this appeal and requested the parties to brief the issue. We have considered the parties' arguments, and conclude that we do not have jurisdiction. Accordingly, we dismiss this appeal.

The trial court entered final judgment on July 20, 1987. Appellants Fellowship Missionary Baptist Church of Dallas, Inc., and its pastor, Reverend Sammie Davis (collectively the "Church"), filed an affidavit of inability to pay costs on August 13. The Church served the affidavit by depositing it in the United States mail on August 17. Appellee Myrtle Sigel filed a contest to the affidavit on August 24, and the trial court conducted a hearing on the contest. The trial court sustained the contest, but failed to enter a timely written order.

Accordingly, the allegations in the affidavit were deemed true by operation of law on September 3. TEX.R.APP.P. 40(a)(3)(E); *Alvarez v. Penfold*, 699 S.W.2d 619, 620 (Tex.App.—Dallas 1985, orig. proceeding). The question then is whether the Church sufficiently complied with rule 40(a)(3)(B) of the Texas Rules of Appellate Procedure so as to be permitted to prose-

cute this appeal without paying the costs or giving security therefor. That section states:

> The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

TEX.R.APP.P. 40(a)(3)(B). The Church filed its affidavit on August 13, a Thursday. It served Sigel by mailing the affidavit on August 17, a Monday. The question then becomes whether service of the August 13 affidavit on August 17 was timely. We hold that it was not.

Two days after August 13 was August 15, a Saturday. Therefore, the last day to serve the affidavit personally on the court reporter was August 17. TEX.R.APP.P. 5(a). In order to serve a party by mail, rule 4(b) requires that any document relating to taking an appeal shall be deemed timely filed[1] if it is "deposited in the mail one day or more before the last day" for taking the required action. TEX.R.APP.P. 4(b). However, rule 5(a) provides:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

TEX.R.APP.P. 5(a). The Church deposited its affidavit in the mail on the last day on which it could have served Sigel. If, however, rule 4 required it to deposit the affidavit in the mail on Sunday, August 16, the Church's service was not timely.

[1] There is a split of authority on this question. One court has held that rule 5(a), in similar circumstances, permits timely filing if the document is deposited in the mail on the Monday following the last day for filing that happened to fall on the weekend. *Ector County Independent School District v. Hopkins*, 518 S.W.2d 576, 583–584 (Tex.Civ.App.—El Paso 1974, no writ) (on mot. for reh'g). Two other courts, however, have held that the document was required to be deposited in the mail on the Sunday preceeding the Monday, in order to be timely. *Walkup v. Thompson*, 704 S.W.2d 938, *passim* (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.) (per curiam); *Martin Hedrick Co. v. Gotcher*, 656 S.W.2d 509, 510–11 (Tex.App.—Waco 1983, writ ref'd n.r.e.). The *Gotcher* Court specifically addressed the interaction between rules 4 and 5, and concluded that compliance with rule 4, by depositing a document in the mail one day before the last day of the period for taking action, was a "condition precedent" for triggering the extension provided by rule 5(a). 656 S.W.2d at 510. We agree with the *Gotcher* Court.

Rule 4(b) provides an extension of the deadline for taking required action, if that deadline would otherwise fall on a Saturday, Sunday, or legal holiday; in short, rule 4(b) creates an exception to the normal method of calculating due dates. Rule 5(a) also creates an exception for the timely receipt of a document relating to the taking of an appeal. If rule 5(a) permitted a Monday mail deposit to be timely when (as in this case) the last day to make an otherwise timely mail deposit would have been the preceeding Friday, rule 5(a) would operate to bootstrap an exception upon an exception. Otherwise put, what rule 4(b), operating alone, cannot accomplish—deeming a filing timely if a document is deposited in the mail on the very day that it is due—rule 4(b), operating in conjunction with rule 5(a), should not be able to accomplish.

[2, 3] We note further that the policy behind rule 4(b), the "mailbox rule," is not to provide gratuitous extensions, but to accommodate situations in which courthouse employees are given a day off. *See Johnson v. Texas Employers' Insurance Association*, 668 S.W.2d 837, 838 (Tex.App.

1. We recognize that TEX.R.APP.P. 4(b) addresses the timeliness only of filing documents, and does not expressly address the timeliness of serving documents. The time to serve documents, however, is "at or before the time of filing." TEX.R.APP.P. 4(e). It necessarily follows that the same considerations in determining whether a document is timely filed apply in determining whether a document is timely served.

—El Paso, 1984), *rev'd on other grounds*, 674 S.W.2d 761 (Tex.1984). As mentioned earlier, the Church, but for rule 5(a), would have had to deposit its affidavit in the mail on Friday, August 14, in order to comply with rule 4(b). That it chose not to mail the affidavit on a business day does not excuse it from failing to mail the affidavit on a weekend day. Nor does it matter that the post office might not postmark a mailing deposited on a Sunday; the postmark is merely *prima facie* evidence of the date of mailing. TEX.R.APP.P. 4(b). In the absence of a postmark obtained on Sunday, the date of mailing can be established (as it indeed was in this case) by affidavit. TEX. R.APP.P. 19(d).

Finally, we note that both the *Walkup* case and the *Gotcher* case had subsequent histories in which the supreme court refused applications for writ of error with the annotation, no reversible error. We acknowledge that the annotation "n.r.e." is dubious when one attempts to extract any authoritative value from it. *See generally* Robertson and Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L.REV. 1, 30–41 (1986). Nevertheless, when a court dismisses a case for want of jurisdiction, its action is predicated on only one ground. Neither the *Walkup* nor the *Gotcher* Courts ever considered the merits of those cases. When the supreme court refused the writ applications with the "n.r.e." notation, the supreme court could not have been indicating that the intermediate courts reached the correct results but not necessarily by the correct rationales when only one rationale—lack of jurisdiction—supported the intermediate courts' actions. Further, the supreme court has corrected an intermediate court's erroneous rationale concerning its jurisdiction when the supreme court chose to do so. *See, e.g., Butts v. Capitol City Nursing Home*, 705 S.W.2d 696, 697 (Tex.1986) (per curiam).

We recognize that the supreme court has recently held that "[i]ndigency provisions, like other appellate rules, have long been liberally construed in favor of a right to appeal." *Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex.1987) (per curiam). Nonetheless, *Jones* is distinguishable from the instant case. In *Jones*, the indigent appellant mailed a letter to the court reporter the day after she filed her affidavit. The letter had been drafted before the affidavit was filed, and its wording indicated that the affidavit would be filed in the near future. The supreme court expressly noted that that letter, while "not a model of precision," was mailed within the two-day period mandated by rule 40(a)(3)(B), and that it "appear[ed] to sufficiently fulfill the purpose of the rule." 747 S.W.2d at 370. In the instant case, there is no dispute that the Church failed to mail its notice of its affidavit within the two-day period. There is a difference between substantial compliance with a rule, so as to fulfill its purpose, and failure to comply with a rule. To hold that depositing the notice required by rule 40(a)(3)(B) one day late were sufficient compliance with the rule, we would, in effect, be rewriting the rule; an appellant could be deemed to have complied with its requirements so long as the court reporter got notice of the affidavit with sufficient opportunity to contest it. We decline to do so. The appellant in *Jones* gave timely, if not altogether clear, notice that she had filed her affidavit; in this case, the Church did not give timely notice at all. We do not read *Jones* to be so broad as to exonerate an appellant's burden of complying with the applicable rules of procedure, so long as no harm results.

[4] We hold, therefore, that the Church's deadline to serve its affidavit was Monday, August 17, by operation of rule 5(a), but that the Church had to deposit its affidavit in the mail no later than Sunday, August 16, in order to make rule 4(b) applicable. Because the Church did not do so, its service of the affidavit was untimely and did not comply with the requirements of rule 40(a)(3)(B). Accordingly, the Church cannot prosecute this appeal without paying the costs thereof or giving security therefor.

We are left with two appellants who have perfected their appeal by filing an affidavit of inability to pay, but who are not entitled to prosecute their appeal with-

out paying the costs or posting security therefor. We recognize that the Church subsequently made a cash deposit in an attempt to preserve its appeal, but that cash deposit is a nullity. *See Shaffer v. U.S. Companies, Inc.*, 704 S.W.2d 411, 413 (Tex.App.—Dallas 1985, no writ). In any case, the cash deposit was made long after the time to perfect an appeal had expired. TEX.R.APP.P. 41(a)(1). Therefore, we have no alternative but to dismiss this appeal, and so order.

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

Mary Craft

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

Rule 15a. Grounds For Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court is evenly divided the motion to recuse shall be ~~denied~~ granted.

COMMENT: The present rule does not contain a provision dealing with an en banc evenly divided court on a motion to recuse. The proposed amendment will deal with that situation without the necessity of bringing in a visiting judge to break the tie. The bringing in of another judge would cause unnecessary difficulties and delays and potential embarrassment.

COAJ recommends.

approved

Copy to LHS
Orig to File
6-1-88
hjh

LAW OFFICES OF
J. Shelby Sharpe

2401 TEXAS AMERICAN BANK BUILDING
FORT WORTH, TEXAS 76102
(817) 338-4900
429-2301 METRO

SCAC
Subc -

May 25, 1988

Mr. R. Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Dear Doak:

Enclosed you will find in appropriate form recommended changes to Rule 15a, Rule 121 and Rule 182, Texas Rules of Appellate Procedure, as per the discussion of the Committee on Administration of Justice at its May 7, 1988 meeting. The Committee can take final action on these proposed changes at the June 4, 1988 meeting.

By copy of this letter, I am sending a copy of these to the other members of my subcommittee, Luther Soules and retired Chief Justice Joe R. Greenhill.

Very truly yours,

Shelby

J. Shelby Sharpe

JSS:cf

cc: Professor Jeremy C. Wicker
Chief Justice J. Curtiss Brown
Luther H. Soules
Honorable Joe R. Greenhill

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LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

June 14, 1988

Mr. Rusty McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Rules of Appellate Procedure

Dear Rusty:

I have enclosed comments sent to me by J. Shelby Sharpe regarding proposed changes to Rule 15a, Rule 121, and Rule 182, Texas Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Joe R. Greenhill

ST. MARY'S UNIVERSITY

Orig to HJH
Copy LHS 2/9/88

HJH -
SC AC Sub C
Agenda.

xc COAs

February 5, 1988

Honorable Howard M. Fender
Chief Justice - Court of Appeals
Tarrant County Courthouse
Fort Worth, Texas 76196

Dear Judge Fender:

Thank you for your letter of January 21, 1988.

I believe the rule change that you suggest should be addressed to the Supreme Court Advisory Committee rather than to the Administration of Rules of Evidence Committee which I chair. I am therefore forwarding your letter to Mr. Luther Soules who is Chairman of the Supreme Court Advisory Committee.

Yours very truly,

/s/

Thomas Black
Professor of Law

TB/asv

cc: Mr. Luther H. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205

00167

SCHOOL OF LAW
ONE CAMINO SANTA MARIA
SAN ANTONIO, TEXAS 78284-0400
(512) 436-3424

HOWARD M. FENDER
Chief Justice, Court of Appeals
SECOND SUPREME JUDICIAL DISTRICT
THE COURTHOUSE
FORT WORTH, TEXAS 76196

Office (617) 334-1900

1/21/88

Dear Professor Black —

Pursuant to your letter of 1/6/88 I would like to suggest a slight amendment to Rule 15 of the Appellate Rules of Procedure governing the disposition of motions to recuse. In the light of increasing litigiousness and the present publicity about judicial selection, I anticipate an increased number of such motions.

At present the rule contains no provision in case the court en banc reaches an even division (i.e., a tie vote). The only recourse is the appointment of a visiting judge — which would be difficult on the Supreme Court and certainly rather embarassing to the visiting judge in any event.

I suggest adding one of two phrases (or sentences) to the end of §(c). Either "In the event the court be evenly divided the the motion to recuse will be denied" or "In the event the court be evenly divided the motion to recuse shall be granted." Either one would provide a solution and save much time and effort. Even the N.F.L. has ample tie-breakers.

Yours very truly,

Howard M. Fender

00168

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WRITER'S DIRECT DIAL NUMBER:

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SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 27, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 15, 136 and 190

Dear Rusty:

Upon review of the SCAC Agenda I was unable to ascertain whether you had been sent copies of the enclosed correspondence from Chief Justice Howard M. Fender and Justice Michol O'Connor. Therefore, I am forwarding same to you at this time. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
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CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

How about a Rule that in Cross Appeals the parties be designated as in Trial Court?

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF APPELLATE PROCEDURE.

I. Exact wording of existing Rule:

Rule 40.

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 40.

(4) Notice of Limitation of Appeal. And Perfection of Appeal By Other Parties

(A) No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party all parties to the suit within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(B) If the scope of an appeal is limited in accordance with this Rule 40(a)(4), any other party may cross-appeal any other portion or portions of the judgment by timely perfecting a separate appeal.

(C) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4), the entire judgment is subject to appellate review. Once an unlimited appeal has been perfected by any party, any other party who has been aggrieved by the judgment may seek a more favorable judgment in the courts of appeal by crosspoint as an appellee without perfecting a separate appeal.

(BAJ)

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Rule 74(e) of the Rules of Appellate Procedure contemplates that any party aggrieved by a judgment may present cross-points as an appellee, even if it has not perfected an appeal, except when the judgment is severable and the appeal has been limited by the appellant to a severable portion. Recent courts of appeals decisions have expansively interpreted the exception to deny jurisdiction of appellees' cross-points even in two-party cases. The mechanism for limiting appeals provided by Rule 40(a)(4) is proving inadequate to abrogate the effect of those decisions.

Uncertainty over when a cross-point requires an independent appeal will result in precautionary perfection of appeals by appellees, rendering the intent behind 74(e), to simplify the procedural burden placed on appellees and to reduce duplication at the appellate level, a nullity. The proposed amendments will clarify the requirements.

Respectfully submitted,

_____
Name

_____

_____
Address

Date _____ 198____

January 31, 1989

Luther H. Soules III
Soules & Wallace
Republic of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205 2230

Re: Texas Rules of Appellate Procedure 4, 5 and 40

Dear Luke,

Enclosed please find proposals for amendment of Appellate Rules 4, 5 and 40 together with explanatory memoranda. Can these be added to the agenda for our May 26-27 meeting?

Best wishes,

Bill

William V. Dorsaneo, III

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

M E M O R A N D U M

TO : The Committee on Administration of Justice

FROM: William V. Dorsaneo III (with Ruth A. Kollman)

DATE: January 30, 1989

RE : Requirement that appellees perfect an appeal in order to assign cross-points of error

Rule 74(e) of the Texas Rules of Appellate Procedure contemplates that any party aggrieved by a judgment may present cross-points as an appellee, even if it has not perfected an appeal. The only exception is when the judgment is severable and the appeal has been limited by the appellant to a severable portion. Both the history of Appellate Rule 74 and Texas Supreme Court decisions support this construction. However, through expansive interpretation of the exception, recent lower court decisions in both multiple-party and two-party cases have developed unnecessary procedural requirements. The purpose of this memorandum is to explore the scope of the exception and to suggest a revision to Rule 40(a)(4) to solve the problem.

Development in the Texas Supreme Court

Prior to the adoption of the Texas Rules of Civil Procedure in 1940, the procedural picture was drawn in cases like Barnsdall Oil Co. v. Hubbard, 130 Tex. 476, 109 S.W.2d 960 (1937). In that case, numerous parties disputed title to two separate tracts of land. Several parties perfected an appeal complaining of the judgment of the trial court concerning one of

the tracts. The appellee sought to assign cross-points of error related to the second tract. As a result of limiting language in the appeal bond, the appellants did not contest and explicitly did not appeal that portion of the judgment. The Texas Supreme Court held:

> We think it likewise obvious that the [appellee] was attempting to have the Court of Civil Appeals revise the judgment of the trial court affecting its 25-acre tract, rather than merely urge counter propositions by cross assignments in the appeal affecting the 84 acres. This it manifestly could not do without prosecuting an appeal from that part of the judgment.

Id. at 964 (citations omitted).

Shortly after deciding Barnsdall, the Texas Supreme Court obtained legislative authority to promulgate new Texas rules of procedure. The resulting Texas Rules of Civil Procedure were published and made effective as of September 1, 1941.

One of the new rules, not based on any prior statutory rule of procedure but reflecting the existing practice, was Rule 420:

> The brief for the appellee shall reply to the points relied upon by appellant in due order when practicable, and in case of cross-appeal the brief shall follow substantially the form of the brief for appellant.

TEX.R.CIV.P. 420 (Vernon 1941). That rule was only in effect for four months. After publication and discussion of the ramifications of the new rules, changes were proposed. Amended Rule 420, effective December 31, 1941, read as follows:

> The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable; and in case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellant.

TEX.R.CIV.P. 420 (Vernon Supp. 1941). The substitution of the language "in case the appellee desires to complain of any ruling or action of the trial court" for the earlier "in case of cross-appeal" wording suggests the drafter's intention to allow an appellee to present cross-points without having to perfect an appeal. With only minor textual changes which reflect its applicability to civil cases only, Rule 74(e) of the Texas Rules of Appellate Procedure is substantially identical.

The drafters of Rule 420 must have placed great importance on simplifying the procedural burden placed on appellees to have made such an amendment so quickly after adoption. Commentaries available after the promulgation of amended Rule 420 support this view. In 1944, the Texas Bar Journal published a series of questions concerning the new rules, with responses provided by three rules committee members. (Stayton, Carter, and Vinson). Their answer to a question concerning cross-points by non-appealing parties supports a reading of the amended Rule 420 as allowing cross-points without requiring appellee to perfect an appeal:

> Laying aside consideration of complaints by one appellee against another appellee ... , we are of the opinion that appellee in the Court of Civil Appeals may, without cross-appeal or cross-assignment of error, urge against appellant any complaints concerning the matter as to which the appellant has perfected his appeal, by the use of "points" in his brief. Cross-appeal was mentioned in original Rule 420 but the amendment to the rule omits mention of it. It is not necessary in Texas as to any complaints concerning the matter brought up by appellant; and that ordinarily means all complaints that appellee has. In some cases, however, appellant may sever, that is, take up a part

only of the matter as it stood in the trial court.

> In such cases ... appellee may not complain of anything within the scope solely of the part not brought up.

7 Tex.B.J. 15 (1944). The notes to Rule 420 published with the 1948 amendments contain similar language and also support that analysis. Interpretation of Rules by Subcommittee, TEX.R.CIV.P. 420 (Vernon 1948).

More authoritatively, the Supreme Court of Texas explained its interpretation of former Rule 420 as follows:

> This rule of practice, which does away with the necessity for prosecuting two appeals from the same judgment and bringing up two records, is well founded and should not be departed from except in cases where the judgment is definitely severable and appellant strictly limits the scope of his appeal to a severable portion thereof.

Dallas Electric Supply Co. v. Branum Co., 143 Tex. 366, 185 S.W.2d 427, 430 (1945).

The exception articulated in Branum is a narrow one. It is three-pronged as well as conjunctive: (1) the judgment itself must be definitely severable; and (2) appellant must strictly limit the scope of its appeal; and (3) the limitation must be to a severable portion of the judgment.

The seminal modern case which articulates the proper analysis is Hernandez v. City of Fort Worth, 617 S.W.2d 923 (Tex. 1981). The Texas Supreme Court cited Branum in overruling the Court of Civil Appeals' holding that it had no jurisdiction to consider appellees' cross-points. The cross-points asserted that the trial court had erred in failing to render judgment for all

the relief to which appellees were entitled. The Court emphatically reiterated its holding in Branum:

> It is not necessary to perfect two separate and distinct appeals, unless the judgment of the trial court is definitely severable, and appellant strictly limits the scope of his appeal to a severable portion.

Id. at 924. The Court went on to specifically repudiate an intermediate appellate court's opinion to the contrary in RIMCO Enterprises, Inc. v. Texas Electric Service Co., 599 S.W.2d 362, 366-67 (Tex. Civ. App. -- Fort Worth 1980, writ ref'd n.r.e.).

After Hernandez the issue appeared to be resolved. Unfortunately, it was not. As explained below, the courts of appeals developed poorly-defined exceptions to the high Court's holdings in Branum and Hernandez that have obscured and undermined the general rule. As Robert W. Stayton observed in his introduction to the first official publication of the new rules in 1942:

> The Texas Rules ... are beset by certain dangers, namely, that future legislative enactments and the decisions of the many intermediate appellate courts, each practically immune from prompt centralized guidance and control, may tend to cause the rules to disappear and the former systems to be reinstated. ...

Stayton, Introduction, TEX.R.CIV.P. (Vernon 1942).

The earlier practice of requiring all appellees to perfect an appeal before asserting cross-points is gradually creeping back. The following paragraphs show how this wrongheaded trend has evolved.

The Courts of Appeals Cases

In 1968, the El Paso court cited both Barnsdall and Branum, without discussing the impact of the 1941 amendment to Rule 420, in expressing reservations about the jurisdiction of the court to consider appellees' cross-points in a multiple-party case. Scull v. Davis, 434 S.W.2d 391 (Tex. Civ. App. -- El Paso 1968, writ ref'd n.r.e.). The Court nonetheless considered and overruled the cross-points. Id. at 395.

The First Court also considered the issue in connection with multiple-party litigation in 1984 in Young v. Kilroy Oil Company of Texas, Inc., 673 S.W.2d 236 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.). Most of the current requirements for independent perfection of appeals by appellees can be traced directly to this decision. Hence, its procedural history is described in detail.

In Young the plaintiff sued 1) his employer, 2) the operator of the lease and 3) the owner of the offshore drilling platform where his injury occurred. The operator cross-claimed against the employer for contractual indemnity. The plaintiff entered into a Mary Carter Agreement with his employer and the owner. The jury found the employer 50% negligent, the operator 40% negligent, and the plaintiff 10% negligent. Damages were found to be $505,000. Despite these findings, the trial court rendered judgment notwithstanding the verdict. The court's decision was based on its determination that the employer owed contractual indemnity to the operator, combined with the provisions of the

Mary Carter Agreement. The net result was a take-nothing judgment as to plaintiff and a judgment in favor of the operator against the employer for attorneys' fees. Only the plaintiff perfected an appeal.

The employer filed a cash deposit in lieu of a supersedeas bond when the operator attempted to execute on the judgment some seven months later. The trial court found that the employer had not properly perfected an appeal. The court vacated the writ of supersedeas, disbursed the amount of the judgment to the operator, and returned the remainder of the deposit to the employer.

The employer attempted to assert cross-points on appeal which alleged error in the judgment in ordering the employer to pay the operator's attorney's fees, and in the order vacating the writ of supersedeas and foreclosing on the cash deposit. The court of appeals denied jurisdiction of the cross-points, stating that the cross-points placed the employer in the role of an appellant and required the timely perfection of an appeal by the employer. Id. at 242.

In Young the First Court cited both Hernandez and Scull in support of its holding that the right of an appellee to use cross-points to obtain a better judgment without perfecting an independent appeal "is subject to the limitation that such cross-points must affect the interest of the appellant or bear upon matters presented in the appeal." Id. at 241 (emphasis in original; citations omitted).

After Young was decided other appellate courts cited it in support of holdings which enlarged the exception further. For example, in 1987 the Beaumont court relied upon Young when the issue arose in a multiple-party case. Miller v. Presswood, 743 S.W.2d 275 (Tex. App. -- Beaumont 1987, no writ). The court observed that no portion of the judgment was favorable to the appellee and held that "[a] cross-point that is not directed to the defense of the judgment against an appellant places the party asserting the cross-point in the role of an appellant," and requires the independent perfection of an appeal. Id. at 279.

The Beaumont court quoted directly from Young in Gulf States Underwriters of La. v. Wilson, 753 S.W.2d 422, 431 (Tex. App. -- Beaumont 1987, no writ). The court considered and sustained a cross-point related to the method of payment of the judgment but denied jurisdiction of a cross-point that complained that the judgment in appellee's favor should have been joint and several as to the appellant and the appellant's co-defendant. The court held that it had no jurisdiction over the cross-point because the appellant had directed no points of error toward the co-defendant. The Beaumont Court reasoned that the co-defendant was, therefore, not a party to the appeal, and without an independent appeal the appellee could not assign cross-points as to the co-defendant. Id. at 431-432.

The Corpus Christi Court came to a similar conclusion in holding that a separate appeal should have been perfected when an

appellee presented cross-points as to a party who had not joined the appellant in the appeal. Yates Ford, Inc. v. Benavides, 684 S.W.2d 736, 740 (Tex. App. -- Corpus Christi 1984, no writ). See also City of Dallas v. Moreau, 718 S.W.2d 776 (Tex. App. -- Corpus Christi 1986, no writ) (where the appellee's cross-points concerned the granting of a summary judgment in favor of two of the defendants; the third defendant had appealed a judgment against it based on a jury verdict).

The San Antonio court recapitulated one variation of the new rule in simple terms: "An appellee may not assign cross points against a co-appellee unless he perfects his own appeal." Southwestern Bell Telephone Co. v. Aston, 737 S.W.2d 130, 131 (Tex. App. -- San Antonio 1987, no writ). Yet more recently in Bonham v. Flach, 744 S.W.2d 690 (Tex. App. -- San Antonio 1988, no writ), the same court stated: "There being no limitation in connection with appellant's appeal from the judgment below, we must consider the cross-point of error." Id. at 694.

As a number of commentators have noted, a line of recent opinions out of the Dallas court found no jurisdiction over cross-points in both multiple-party and two-party appeals. First, in Miller v. Spencer, 732 S.W.2d 758, 761 (Tex. App. -- Dallas 1987, no writ), the Dallas Court cited Barnsdall (again without considering the effect of the 1941 amendment to Rule 420), Yates and Young in a two-party appeal, where the appellees' cross-points alleged error in the granting of the appellant's motion to set aside a default judgment.

The Dallas court also has broadened the Young exception in Triland Inv. Group v. Warren, 742 S.W.2d 18, 25 (Tex. App. -- Dallas 1987, no writ). Warren cited Young in requiring a separate cost bond for an appellee to perfect appeal of cross-points "unrelated to the defense of the judgment or to the grounds of appeal raised by [appellant]." The court further complicated the issue by considering cross-points related to evidentiary matters pertaining to submitted jury issues but dismissing cross-points related to rulings of the trial court on evidence pertaining to damages and on other causes of action asserted by the appellee. Id. at 25-26.

The Dallas court has also found no jurisdiction over cross-points asserted by appellees in a series of recent cases: Chapman Air Conditioning, Inc. v. Franks, 732 S.W.2d 737 (Tex. App. -- Dallas 1987, no writ); Ragsdale v. Progressive Voters League, 743 S.W.2d 338 (Tex. App. -- Dallas 1987, no writ); and Essex Crane Rental Corporation v. Striland Construction Company, Inc., 753 S.W.2d 751 (Tex. App. -- Dallas 1988, no writ).

Finally, the most recent Dallas Court of Appeals case of Agricultural Warehouse v. Uvalle, 759 S.W.2d 691 (Tex. App. -- Dallas 1988, no writ) took the trend to its logical conclusion. Even in an essentially two-party case (there had been a worker's compensation carrier/intervenor and a defaulted co-defendant), the court cited its own prior opinions in Essex and Chapman in denying jurisdiction of appellee's single cross-point:

> By cross-point [appellee] complains that the trial court erred in granting [appellant's] motion to disregard jury findings and in failing to award exemplary damages in the judgment. [Appellee's] cross-point places it in the role of an appellant. As an appellant, [appellee] must timely file a cost bond pursuant to Texas Rules of Appellate Procedure 41(a). As no cost bond was filed, he is not entitled to have his cross-point considered.

Id. at 696 (citations omitted).

Recommendations

Given the above, it could be argued that the careful practitioner should now always timely perfect an appeal -- win, lose, or draw -- just to make sure he or she preserves the client's right to bring cross-points as appellee. It is difficult (and professionally perilous) to determine when an appellate court will find that a cross-point requires a separate appeal and when it will not; the jurisdictional line is now not only ill-defined, it is ambulatory. Once again, Judge Stayton's prediction rings true: the application of the rule has come full circle.

Appellate Rule 40(a)(4) now provides a mechanism for notice of limitation of appeal by an appellant, but the effects of limitation or non-limitation are not explained in the rule. As the line of cases decided since the enactment of the Rules of Appellate Procedure indicate, broad exceptions to the concept that an appellee may obtain a better judgment by cross-point, within perfecting an independent appeal, have been devised. The

most expeditious way to clarify the requirements would be to revise Rule 40(a)(4) of the Texas follows:

(4) Notice of Limitation

(A) No attempt to l
appeal shall be effective
unless the severable porti
from which the appeal is t
in a notice served on all
within fifteen days after
or if a motion for new tri
party, within seventy-five
judgment is signed.

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appellate review. Once an
has been perfected by any
party who has been aggriev
may seek a more favorable
courts of appeal by cross-p
appellee without perfectin
appeal.

In the words of the Dallas Court of Appeals (albeit on another jurisdictional question), until the issue is resolved "[t]he appellate court's jurisdiction [must now] be determined case by case, and litigants ... have no assurance of the court's jurisdiction until such a determination [is] made. To make jurisdiction depend on such a 'degree' of difference is to thwart the purpose behind the rules of appellate procedure." Brazos Electric Power Cooperative, Inc. v. Callejo, 734 S.W.2d 126 (Tex. App. -- Dallas 1987, no writ).

most expeditious way to clarify the requirements would be to revise Rule 40(a)(4) of the Texas Rules of Appellate Procedure as follows:

> (4) Notice of Limitation of Appeal.
>
> (A) No attempt to limit the scope of an appeal shall be effective as to any party unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on all parties to the suit within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.
>
> (B) If the scope of an appeal is limited in accordance with this Rule 40(a)(4), any other party may cross-appeal any other portion or portions of the judgment by timely perfecting a separate appeal.
>
> (C) Unless the scope of an appeal is limited in accordance with this Rule 40(a)(4), the entire judgment is subject to appellate review. Once an unlimited appeal has been perfected by any party, any other party ~~who has been aggrieved by the judgment~~ may seek a more favorable judgment in the courts of appeal by cross-point as an appellee without perfecting a separate appeal.

In the words of the Dallas Court of Appeals (albeit on another jurisdictional question), until the issue is resolved "[t]he appellate court's jurisdiction [must now] be determined case by case, and litigants ... have no assurance of the court's jurisdiction until such a determination [is] made. To make jurisdiction depend on such a 'degree' of difference is to thwart the purpose behind the rules of appellate procedure." Brazos Electric Power Cooperative, Inc. v. Callejo, 734 S.W.2d 126 (Tex. App. -- Dallas 1987, no writ).

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

that pretrial proceedings have been completed

Certification of current readiness for trial shall not be required in order to obtain a setting in a contested case

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Herbert

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment provisions as quasi-jurisdictional, and not su waiver or the harmless error rule, goes agains modern procedure. Absent a showing of harm by torney or the court reporter, the failure of t indigent to give notice of intent to seek an a posting a cost bond should never result in los The language of T.R.App.P. 40(a)(3)(B) has bee strictly by ignoring the possibility that lack non-waivable or harmless, or that actual knowl affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the major indigent appeals are dismissed for lack of jur failure to comply with notice requirements. I proposal to liberalize the requirements and su additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by ad davit of inability to pay costs on appeal shal specified in Rule 145 of the Texas Rules of Ci

2. Amend T.R.App.P. 40(a)(3)(B) to pr notice requirement be the same as the criminal clerk notify opposing counsel of the filing of inability, and eliminate altogether the requir the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by del following the semi-colon ("otherwise . . ..) a following:

> "Should it appear to the court that no given under this subsection the court clerk to notify opposing counsel and e hearing an additional ten days after t of extension."

This would be consistent with the provisions o 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

Mary Craft

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

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August 31, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 40 and 53(j)

Dear Rusty:

Enclosed herewith please find a copy of a letter I received from Justice William W. Kilgarlin regarding Texas Rules of Appellate Procedure 40 and 53(j). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Honorable Antonio A. Zardenetta

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

August 17, 1988

HJH
SCAC Subcommittee
TRCP 145
TRAP
Agenda at Both.
7

Hon. Antonio A. Zardenetta
111th Judicial District
Laredo, Texas 78040

Dear Judge Zardenetta:

I am in receipt of your letter of May 19, 1988 regarding the proposed changes to the Rules of Civil Procedure, and I appreciate your taking the time to write.

I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

00200

Antonio A. Zardenetta
DISTRICT JUDGE
111TH JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40, Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

Rule 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) (No change.)
(c) (No change.)
(d) (No change.)
(e) (No change.)
(f) (No change.)
(g) (No change.)
(h) (No change.)
(i) (No change.)
(j) (No change.)
(k) (No change.)

with effect and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety shall give his post office address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.

(b) Deposit. In lieu of a bond, appellant may make a deposit with the clerk pursuant to Rule 48 in the amount of $1000, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.

(c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing the amount shall affect perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter.

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by counsel for appellant by mailing a copy thereof to counsel of record or each party other than the appellant or, if a party is not represented by counsel, to the party at his last known address. Counsel shall note on each copy served the date on which the appeal bond or certificate was filed. Failure to serve a copy shall be ground for dismissal of the appeal or other appropriate action if appellee is prejudiced by such failure.

(e) Payment of Court Reporters. Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts.

(f) Amendment: New Appeal Bond or Deposit. On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.

Rule 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40,~~ it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damage occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal.

(c) Land or Property. When the judgment is for the recovery of land or other property, then the bond, deposit, or orders which adequately protect the judgment creditor for any loss or damage occasioned by the appeal shall be further conditioned

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LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 47(a)

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding TRAP 47(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

00206

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Texas Rules of Appellate Procedure

Rule 47. ~~Supersedeas-Bond-or-Deposit-in-Civil-Cases~~ [Suspension of Enforcement of Judgment Pending Appeal in Civil Cases]

(a) ~~May--Suspend--Execution.~~ [Suspension of Enforcement.] Unless otherwise provided by law or these rules, ~~an-appellant~~ [a judgment debtor] may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, [subject to review by the court on hearing,] or making the deposit provided by Rule 48, payable to the ~~appellee~~ [judgment creditor] in the amount provided below, conditioned that the ~~appellant~~ [judgment debtor] shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule 40, it constitutes sufficient compliance with Rule 46. [The trial court may make such orders as will adequately protect the judgment creditor against any loss or damage occasioned by the appeal.]

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. [The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal.]

(c) Land or Property. When the judgment is for the recovery of land or other property, [then] the bond[,] or deposit [, or orders which adequately protect the judgment creditor for any loss or damage occasioned by the appeal] shall be further conditioned that the ~~appellant~~ [judgment debtor] shall, in case the judgment is affirmed, pay to the ~~appellee~~ [judgment creditor] the value of the rent or hire of such property during the appeal, and the bond[,] or deposit[, or alternate security] shall be in the amount estimated or fixed by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the ~~appellant~~ [judgment debtor] may ~~supersede~~ [suspend] the [enforcement of the] judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by ~~filing--a supersedeas-bond-or-making-a-deposit~~ [posting security] in the amount [and type] to be ~~fixed~~ [ordered] by the [trial] court

COAJ Recommendation (Court Law

below, not less than the rents and hire of said real estate; but if the amount of ~~said supersedeas bond or deposit~~ [the security] is less than the amount of [any] money judgment, with interest and costs, then the [judgment creditor can execute against any other property of the judgment debtor unless the ~~appellee shall be allowed to have his execution against any other property of appellant.~~ trial court within its discretion orders a suspension of enforcement of the money judgment with or without the posting of additional security.]

(e) Foreclosure on Personal Property. When the judgment is for the recovery of or foreclosure upon specific personal property, the ~~appellant~~ [judgment debtor] may ~~supersede~~ [suspend] the [enforcement of the] judgment insofar as it decrees the recovery of or foreclosure against said specific personal property ~~or by filing a supersedeas bond or making a deposit~~ [by posting security] in an amount [and type] to be ~~fixed~~ [ordered] by the [trial] court below, not less than the value of said property on the date of rendition of judgment, but if the amount of the ~~supersedeas bond or deposit~~ [security] is less than the amount of the money judgment with interest and costs, then the [judgment creditor can execute against any other property of the judgment debtor unless the ~~appellee shall be allowed to have his execution against any other property of appellant.~~ trial court within its discretion orders a suspension of enforcement of the money judgment with or without the posting of additional security.]

(f) Other Judgment. When the judgment is for other than money or property or foreclosure, the ~~bond or deposit~~ [security] shall be in such amount [and type] to be ~~fixed~~ [ordered] by the ~~said~~ [trial] court below as will secure the ~~plaintiff in judgment~~ [judgment creditor] ~~in~~ [for] any loss or damage occasioned by the ~~delay on appeal, but t~~[. T]he [trial] court may decline to permit the judgment to be suspended on filing by the ~~plaintiff~~ [judgment creditor] of ~~a bond or deposit to be fixed~~ [security to be ordered] by the [trial] court in such an amount as will secure the ~~defendant~~ [judgment debtor] in any loss or damage ~~occasioned~~ [caused] by any relief granted if it is determined on final disposition that such relief was improper.

(g) ~~Child~~ [Conservatorship or] Custody. When the judgment is one involving the care [conservatorship] or custody of a child, the appeal, with or without ~~a supersedeas bond or deposit~~ [security] shall not have the effect of suspending the judgment as to the care [conservatorship] or custody of the child, unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) For State or Subdivision. When the judgment is in favor of the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is

such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the ~~bond or deposit~~ [security] shall be allowed and its amount [and type ordered] ~~fixed~~ within the discretion of the trial court, and the liability of the ~~appellant~~ [judgment debtor] shall be for the ~~face~~ amount [of the security] if the appeal is not prosecuted with effect. ~~The discretion of the trial court in fixing the amount shall be subject to review. Provided, that u~~[U]nder equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the ~~bond or deposit~~ [security] may allow recovery for less than its full ~~face~~ amount.

(i) Certificate of Deposit. If the ~~appellant~~ [judgment debtor] makes a deposit in lieu of a bond, the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.

(j) Effect of ~~Bond or Deposit~~ [Security]. Upon the filing and approval of a proper supersedeas bond ~~or the making of a deposit in compliance with these rules~~ [, deposit, or the provision of such alternate security as ordered by the trial court in compliance with these rules], execution of the judgment or so much thereof as has been superseded, shall be suspended, and if execution has been issued, the clerk shall forthwith issue a writ of supersedeas.

[(k) Continuing Trial Court Jurisdiction. The trial court shall have continuing jurisdiction during the pendency of an appeal from a judgment, even after the expiration of its plenary power, to order the amount and the type of security and the sufficiency of sureties and, upon any changed circumstances, to modify the amount or the type of security required to continue the suspension of the execution of the judgment. If the security or sufficiency of sureties is ordered or altered by order of the trial court after the attachment of jurisdiction of the court of appeals, the judgment debtor shall notify the court of appeals of the security determination by the trial court. The trial court's exercise of discretion under this rule is subject to review under Rule 49.

cc James Kronzer
Jeffers
PIA
MRY

RECD 12/18/87

MEMORANDUM

November 20, 1987

RECEIVED
NOV 23 1987
H.M.R.

TO: Harry M. Reasoner

FROM: Janice Cartwright

RE: Joint Special Committee on Security for Judgments

Attached are the following materials distributed at today's Joint Special Committee on Security for Judgments meeting:

1. Statement of Professor Elaine A. Carlson

2. Amended Texas Rules of Appellate Procedure Rule 47 and Amended Texas Rules of Appellate Procedure Rule 49

As you are aware, this committee is a result of the Texaco/Pennzoil case. I thought this might be of interest to you.

JACA

cc: Marion Sanford, Jr.

Harley

SCAC

CC to Luke Soules

Xc to files TRAP 47 & 49

00210

STATEMENT OF PROFESSOR ELAINE A. CARLSON

VISITING PROFESSOR OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW

PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW

before the

Joint Special Committee on Security for Judgments

of the Texas Legislature

November 20, 1987

Chairmen and Members of the Committee,

I appreciate the trust that you have placed in me by your request that I address this distinguished audience on matters raised by Senate Concurrent Resolution No. 122, and I welcome the opportunity to provide this synopsis of pertinent Texas law. In particular my remarks will concentrate on constitutional provisions concerning appeals in civil cases and whether the Texas procedure for establishing a supersedeas bond to suspend execution of a judgment pending appeal is in harmony with any such due process guarantees. It is my understanding that all committee members have received a copy of an extensive law review article I recently authored on this subject entitled, "Mandatory Supersedeas Bond Requirements-A Denial of

Due Process Rights?" which appears in Volume 39 of the Baylor Law Review at page 29. Due to time restrictions, my remarks today will summarize its principal conclusions. In addition, I will address amendments to the Texas Rules of Appellate Procedure concerning security on appeal, which were recently ordered by the Texas Supreme Court on recommendation of the Supreme Court Advisory Committee and which technically are effective the first of January, 1988.

I. CONSTITUTIONAL REQUIREMENTS

The Federal Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of law." This language has been construed to mandate that all citizens shall enjoy free and open access to the courts of the United States in order to obtain redress for injury. Due process requires that the opportunity to obtain access to the courts be granted to all litigants "at a meaningful time and in a meaningful manner." Procedural due process is said to insure citizens their day in court by providing notice of the proceeding and an opportunity to be heard. How many courts does a litigant have a right to be heard in-a trial court, an appellate court, two appellate courts, the United States Supreme Court? Constitutional due process does not require that individual states provide open access to their appellate courts. This right of access vel non

is wholly within the discretion of the state. Consequently, the right to appellate review is not conferred by the United States Constitution.

II. TEXAS OPEN COURTS PROVISION

Texas provides its citizens with guaranteed rights of appellate access by article I, section 13 of the Texas Constitution. This open courts provision provides that "all courts shall be open, and every person for an injury done him in his lands, goods, person or property shall have remedy by due course of law." The due process pledge enunciated in this section originates from the Magna Carta and ensures that Texas litigants will not unreasonably be denied access to any of the state's courts. The constitutions of thirty-eight states contain similar provisions. This right is a substantive state constitutional right which cannot be compromised by judicial decree, legislative mandate, or rules of procedure..

In order for the right of appeal, as established in the Texas Constitution, to satisfy the requirements of due process, it must afford all litigants with a "fair opportunity" to obtain a "meaningful appeal" on the merits. Absent the guidelines of due process, the right of appeal would be reduced to merely a right of access; appeal becomes a meaningless ritual when the opportunity to effectively present appellant arguments does not exist.

Texas courts have liberally construed laws prescribing procedures for appeal in order to protect this constitutional right. However, liberal statutory construction is unavailable when the law is set forth in clear and unambiguous language.

III. TEXAS PROCEDURE TO OBTAIN A MEANINGFUL APPEAL

A. Cost Bond to Perfect Appeal

When a final judgment is rendered in a civil cause of action in Texas, the Texas procedure provides the judgment debtor with several options: Texas Rules of Appellate Procedure 40 and 41 establish that the judgment debtor has, as a general rule, a thirty day period after the judgment is signed to either perfect his right of appeal, file a motion for new trial or simply let the judgment become final. As soon as the thirty days has elapsed, the rules grant the judgment creditor the right to begin immediate execution upon such judgment.

If the judgment debtor desires to appeal the trial court decision, he must take the appropriate steps to perfect his appeal as set forth by Rule 46 of the Texas Rules of Appellate Procedure. Perfecting appeal requires the execution of a cost bond, also known as an appeal bond, to the clerk of the trial court in the amount of one thousand dollars. The trial court is empowered with the discretionary authority to alter the cost

bond amount should the costs of court vary from that amount. (The cost bond is conditioned on the appellant executing his appeal with effect and paying all costs.)

When the appellant is financially unable to pay the amount of the cost bond, Appellate Rule 40 enables him to preserve his right of appeal by proceeding in forma pauperis and filing with the clerk an affidavit which states that he lacks the necessary financial resources.

The flexibility in the Texas rules prevents payment of a cost bond from being an absolute precondition to the perfection of an appeal, thus allowing the appellant an opportunity for judicial review.

B. Supersedeas Bond to Stay a Money Judgment Prior to Recent Rules Amendments Ordered Effective January 1, 1988.

After an appeal has been perfected, the appellant may suspend enforcement of a trial court judgment in order to preserve the pre-judgment status quo pending completion of the appeal. Although the common law rule was contrary, presently in Texas the filing of an appeal does not work an automatic stay of a money judgment. The losing litigant effectuates a suspension of execution of judgment by filing a supersedeas bond with the trial court, which must be approved by the clerk. Appellate rule 47 currently facially mandates that the amount of bond (or deposit) shall be at least the amount of the

judgment, if a money judgment, interest and costs. The filing of the supersedeas bond suspends the power of the trial court to issue any execution on the judgment and provides security to the judgment creditor for the delay in the enforcement of the judgment. The supersedeas bond does not suspend the validity of the judgment; it only suspends the execution of the judgment against the appellant pending appeal, thereby operating as a stay.

Under appellate rules technically effective until January 1, 1988, unless a supersedeas bond is filed, a money judgment of a Texas trial court is enforceable, and it is the duty of the clerk to pay out any funds in his hands to the judgment creditor and to issue execution pending appeal upon application, notwithstanding that an appeal is perfected and is pending. This is true even though the appellant has timely filed a cost bond. (As previously noted, the cost bond serves a distinctive purpose than the supersedeas bond: the former secures the costs incurred at the trial court, while the latter protects the judgment creditor from dissapation of assets when execution of the judgment is suspended pending an appeal.) Until recently, Texas procedure has necessarily interposed the ability of an appellant to pay a supersedeas bond as a condition precedent to the right to suspend execution of a money judgment pending appeal. This inflexible requirement of posting such a bond to forestall execution of a money judgment coupled with the lack of judicial discretion to examine

circumstances and provide for alternate forms and amounts of security which would adequately protect a judgment creditor, denies an appellant's due process right to an effective appeal as guaranteed by the open courts provision of the Texas Constitution.

Decisions of the Texas Supreme Court construing the open courts provision reaffirm that any law "that unreasonably abridges a justifiable right to attain redress for injuries caused by the wrongful act of another amounts to a denial of due process under Article I, section 13 and is therefore void." Validly enacted rules of civil procedure have the force and effect of law and thus are subject to this same constitutional constraint.

C. Texas Procedure To Stay a Money Judgment Pending Appeal Under Amended Rules Ordered Effective January 1, 1988.

Recently, the Texas Supreme Court ordered that procedural rules providing for the posting of security on appeal be amended effective January 1, 1988. (See attached) Texas Rule of Appellate Procedure 47, subsection b, is amended to empower the trial court with discretion to determine the type and amount of security necessary to suspend enforcement of a civil money judgment pending appeal. Specifically, if the trial court, after notice and hearing, finds that the posting of a supersedeas bond in the amount of the judgment, interest, and

costs will cause irreparable harm to the judgment debtor (the appellant) and that not posting the bond will cause no substantial harm to the judgment creditor (the appellee), the court may condition a stay of the judgment upon the posting of such security, if any, it finds necessary to adequately protect the judgment creditor against loss occasioned by the appeal. This modification to Texas procedure-removing in extenuating circumstances the absolute requirement of posting a bond to forestall execution coupled with the clothing of judicial discretion to provide for alternate security which otherwise will protect the judgment creditor-opens up an efficacious avenue for meaningful appellate review envisioned and guaranteed by the Texas Constitution.

Not only is the appellate courthouse door open for review on the merits of the underlying cause of action, but by virtue of amendments to Texas Rule of Appellate Procedure 49, subsection c, a trial court's order concerning security necessary to suspend enforcement of a civil judgment pending appeal is subject to review on motion as well. The motion is to be heard at the earliest practical time by the intermediate court which is empowered to issue any temporary orders necessary to preserve the rights of the parties; remand to the trial court for any necessary fact findings or taking of evidence; and to order a change in the trial court's order concerning security it finds proper. If additional security is

ordered by the appellate court to suspend enforcement of the judgment, the judgment debtor has twenty days to comply or execution may issue.

An additional significant modification to Texas practice is that amended Texas Rule of Appellate Procedure 47, subsection k, now empowers the trial court with continuing jurisdiction during the appeal, notwithstanding the loss of plenary power, to make orders concerning security on appeal inclulding orders pertaining to the sufficiency of sureties. If changed circumstances mandate, the trial court may modify its earlier order concerning security. Any such order of the trial court is subject to appellate review as discussed above.

Do these amended rules protect the constitutional right of access to a meaningful appellate review? I believe so. In analyzing the constitutionality of the amended Texas supersedeas bond requirement as a prerequisite to stay a money judgment in light of the open court provision, it is necessary to first ascertain the purpose of the alleged barrier to judicial access (here the security requirement) and then balance this purpose against the interference that the rule creates with the ability of a litigant to obtain effective access to Texas appellate courts.

It is clear that the general purpose of the supersedeas bond requirement is to protect the judgment creditor from the dissipation of assets that he is entitled to by the judgment

which may occur as a direct result of a delay in the enforcement of the judgment pending appeal.

The second prong of the open courts provision test traditionally applied by the Texas courts requires a showing that the litigant's ability to access Texas courts is not unreasonably restrained by the rule, statute, or other law under consideration.

A judgment debtor who wishes to appeal the decision of the trial court when the judgment exceeds his financial worth will be able to perfect his right to appeal, but will not possess the capability to file a supersedeas bond to suspend execution of the judgment. A direct relationship between the appellant's deprivation of his property pending appeal and his right to suspend judgment is apparent. However, in balancing the purpose of the obligatory supersedeas bond requirement against the restriction of access to an appeal unfettered by execution on the underlying judgment, it would seem that the restrictions imposed by the supersedeas bond requirements are neither onerous nor unreasonable. One must be mindful that the appellant has had his day, at least before the trial court with the commensurate opportunity to present evidence and be heard, yet was unsuccessful. The property rights of the successful litigant in the ordered recovery must be considered as well. Reasonable procedural provisions to safeguard litigated property rights have been judicially sanctioned by the United States Supreme Court. Further, execution on a money judgment

pending appeal does not moot the appeal or require dismissal of the appeal. If the judgment of the trial court is reversed on appeal, the judgment creditor is liable to the appellant in restitution. Mandatory supersedeas bond requirements do not result in the denial of an appellant's due process rights when the appellant lacks the financial ability to post adequate security to protect the appellee and execution on the judgment transpires pending the appeal.

A different conclusion would be mandated under the procedural scheme in Texas prior to the recent amendments to Appellate rules 47 and 49 if the judgment debtor were rigidly and absolutely required to post a supersedeas bond in the amount of the judgment, interest and costs when the judgment debtor would be seriously injured by this precondition to forestall execution AND could by the posting of alternate security otherwise protect the judgment creditor. This prior practice created the potential for an unreasonable precondition which would deny access to an effective appeal. Under the amended scheme however, whereby both the trial court and the appellate court on review may order alternate security which protects the successful trial court litigant and also forestalls execution, the absolute and unreasonable precondition is removed.

Rule 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of Suspension to Enforcement of Judgement Pending Appeal. The trial court's order pursuant to Rule 47 is subject to review by a motion to the ~~court of appeals~~ [appellate court]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

COAJ disapproves

Alan rejected

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SOULES & WALLACE

ATTORNEYS AT LAW

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JAMES P. WALLACE ‡

April 12, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 49(a) and (b)

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding TRAP 49(a) and (b). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

00223

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April 25, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

1. Enclosed is a memo discussing prob
P. 49(a) and 49(b). The memo concludes tha
may not have the authority to review a supe
excessiveness.

2. Tex. R. Civ. P. 687(e) still says 1
needs to conform with new Tex. R. Civ. P. 68

3. Enclosed are the new rules for the
look over them and advise me if they can be

4. Tex. R. Civ. P. 201-5 states that "
party . . . may be taken in the county of su
provisions of paragraph 4 of Rule 166b." I
me see how Tex. R. Civ. P. 166b-4 is involve

Sincerely,

William W. Kilgar

WWK:sm

Encl.

Should be "5"

Mr. Soules

00224

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

April 25, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

1. Enclosed is a memo discussing problems with Tex. R. App. P. 49(a) and 49(b). The memo concludes that the supreme court may not have the authority to review a supersedeas bond for excessiveness.

2. Tex. R. Civ. P. 687(e) still says 10 days on TRO's. It needs to conform with new Tex. R. Civ. P. 680.

3. Enclosed are the new rules for the Dallas CA. Please look over them and advise me if they can be approved.

4. Tex. R. Civ. P. 201-5 states that "depositions of a party . . . may be taken in the county of suit subject to the provisions of paragraph 4 of Rule 166b." I can't for the life of me see how Tex. R. Civ. P. 166b-4 is involved.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

Should be "5"

00224

DISCUSSION: Tex. R. App. P. 47 pertains to the establishment of a supersedeas bond for various types of judgments. This rule was amended by Supreme Court order of July 15, 1987, effective January 1, 1988. The current version of Rule 47 contains section (k). The language in this new section provides the TC with continuing jurisdiction over a supersedeas bond during the pendency of an appeal, even after the expiration of the TC's plenary power. Section (k) also authorizes the TC to modify the amount of a bond upon a finding of changed circumstances. The TC's exercise of discretion under this rule is subject to review under Rule 49.

Tex. R. App. P. 49 pertains to appellate review of the TC's discretion in setting and modifying a supersedeas bond. This rule was amended at the same time as Rule 47.

ISSUE: As a result of the amended langauge to Rule 49, I am concerned that it no longer provides the Supreme Court with jurisdiction to review a supersedeas bond for excessiveness as opposed to insufficiency. This motion apparently presents a matter of first impression under amended Rule 49.

ANALYSIS: Tex. R. App. P 3(a), which contains definitions of terms used in the rules of appellate procedure is the starting point for review. This rule defines the term "Appellate Court" to include: "the courts of appeals, the Supreme Court and the Court of Criminal Appeals." In interpreting Rule 49, this definition will be applied.

Section (a) of Rule 49

The amended language of Tex. R. App. P. 49(a) did not substantially alter the previous version of this section. The amended version is set forth below:

> **(a) Sufficiency.** The sufficiency of a cost or supersedeas bond or deposit or the sureties thereon or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed with and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

By applying the definition of "Appellate Court" as set forth in Rule 3(a), section (a) of Rule 49 still enables the Supreme Court to review a supersedeas bond for insufficiency. The rule contemplates the situation where a judgment creditor complains that the amount of a supersedeas bond is insufficient to adequately protect his interest while his ability to execute on his judgment is suspended. It does not address the situation where the judgment debtor complains that the amount of a supersedeas bond is excessive.

Section (b) of Rule 49

The previous version of section (b) is set forth below:

> **(b) Excessiveness.** In like manner, the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive.

In accordance with the definition of "Appellate Court" as set forth in Rule 3(a), the Supreme Court clearly was empowered to review for excessiveness a supersedeas bond. However, this language has been entirely deleted from the current version of section (b) as amended by the Supreme Court. This language was retained in the current version of section (b) to Rule 49 which was adopted by the Court of Criminal Appeals.

The amended version of section (b) is set forth below:

> **(b) Appellate Review of Suspension of Enforcement of Judgment Pending Appeal.** The trial court's order pursuant to Rule 47 is subject to review by a motion to the court of appeals. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.
>
> The court of appeals reviewing the trial court's order may require a change in the trial court's order. The court of appeals may remand to the trial court for findings of fact or the taking of evidence.

The basis of my concern that Rule 49 no longer provides the Supreme Court with jurisdiction to review a supersedeas bond for excessiveness, is founded in the interpretation of three key sentences in the amended language of section (b).

The first key sentence states that: "The trial court's order pursuant to Rule 47 is subject to review by a motion to the court of appeals." This language provides that when the trial court modifies the amount of a supersedeas bond, upon a finding of changed circumstances, the court of appeals by motion can review the decision. When read in conjunction with section (a), this enables the court of appeals to review a supersedeas bond for excessiveness as well as for insufficiency. If the drafters had intended to also enable the Supreme Court to review a supersedeas bond for excessiveness, they would have employed the term appellate court as defined in Tex. R. App. P. 3(a).

However, in the second key sentence of section (b) to amended Rule 49, the drafters did make this distinction: "The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties." This language clearly authorizes the action this court took on April 8th in granting movant's motion for a temporary order to stay enforcement of the TC order increasing the supersedeas bond.

In the third key sentence, the drafters again change terms to apparently make a distinction: "The court of appeals reviewing the trial court's order may require a change in the trial court's order." When read with the first sentence of section (b), this language permits the court of appeals to decrease the amount of a supersedeas bond upon a determination that it is excessive.

CONCLUSION: Based upon the plain language in the amended version of section (b), and as read in conjunction with section (a) and Rule 47, it does not appear that the drafters restored the authority of this court to review a supersedeas bond for excessiveness.

Sections (a) and (b) of Rule 49 permit a court of appeals to review for insufficiency and excessiveness a supersedeas bond and to change the amount of the bond accordingly. These sections enable the Supreme Court to review a supersedeas bond only for insufficiency. The rule does, however, authorize the Supreme Court to issue a temporary order to preserve the rights of the parties.

A review of the Supreme Court Advisory Committee Minutes of June 16-27, 1987, does not indicate whether this distinction was actually intended. The Minutes do show that the drafters were concerned with providing a method of review when a TC exercises its discretion, under Rule 47, before or during attachment of jurisdiction by a court of appeals. However, the Minutes do not indicate that a method of review for excessiveness was contemplated for when a TC increases the amount of a supersedeas bond during the period of time after a court of appeals denies a final motion for rehearing and before the time that this court acquires jurisdiction of the matter. Section (b) of Rule 49 also does not provide for review for excessiveness of a supersedeas bond that is increased by a TC after the Supreme Court has obtained jurisdiction of the matter. In the present case, the TC increased the amount of the bond approximately one week before the movant filed his application for writ of error with this court.

This ambiguity can be remedied by substituting the term "Appellate Court" for the term "Court of Appeals" in each of the sentences in section (b) of Rule 49.

Texas Rules of Appellate Procedure

Rule 49. Appellate Review of Bonds [Security] in Civil Cases

(a) Sufficiency. The sufficiency of a cost or supersedeas bond or deposit [or the sureties thereon] or of any other bond or deposit under Rule 47 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed in and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

(b) ~~Excessiveness.--In-like-manner,-a-appellate-court-may review-for-excessiveness-the-amount-of-the-bond-or-deposit-fixed by-the-trial-court-and-may-reduce-the-amount-if-found-to-be excessive.~~ [Appellate Review of Suspension of Enforcement of Judgment Pending Appeal. The trial court's order pursuant to Rule 47 is subject to review by a motion to the court of appeals. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The court of appeals reviewing the trial court's order may require a change in the trial court's order. The court of appeals may remand to the trial court for findings of fact or the taking of evidence.]

(c) ~~Insufficiency---of---Supersedeas---Bond---or---Deposit.~~ [Alterations in Security.] If [upon its review,] the appellate court requires additional ~~bond-or-other~~ security for ~~supersedeas~~ [suspension of enforcement of the judgment], ~~execution~~ [enforcement] of the judgment shall be suspended for twenty days after the order [of the court of appeals] is served. If the ~~appellant~~ [judgment debtor] fails to comply with the order within that period, the clerk shall notify the trial court that execution may be issued on the judgment; ~~but-the-appeal-shall-not be-dismissed-unless-the-clerk-finds-that-the-bond-or-deposit-is insufficient-to-secure-the-costs~~. The additional security shall not release the ~~liability-of-the-surety-on-the-original-bond~~. [security previously posted or alternative security arrangements made.]

If the clerk finds that the original supersedeas bond or deposit is insufficient to secure the costs, he shall notify appellant of such insufficiency. If ~~appellant~~ [a judgment debtor] fails, within twenty days after such notice, to file a new bond or make a new deposit in the trial court sufficient to secure payment of the costs and to file a certified copy of the

bond or certificate of deposit in the appellate court, the appeal or writ of error shall be dismissed. The additional security shall not release the liability of the surety on the original supersedeas bond.

cc Jamar Kronzer Jeffers PIA MRY

RECD 12/18/87

MEMORANDUM

November 20, 1987

RECEIVED
NOV 23 1987
H.M.R.

TO: Harry M. Reasoner

FROM: Janice Cartwright

RE: Joint Special Committee on Security for Judgments

Attached are the following materials distributed at today's Joint Special Committee on Security for Judgments meeting:

1. Statement of Professor Elaine A. Carlson

2. Amended Texas Rules of Appellate Procedure Rule 47 and Amended Texas Rules of Appellate Procedure Rule 49

As you are aware, this committee is a result of the Texaco/Pennzoil case. I thought this might be of interest to you.

JACA

cc: Marion Sanford, Jr.

CC to Luke Soules

Xc to files TRAP 47 & 49

00231

STATEMENT OF PROFESSOR ELAINE A. CARLSON

VISITING PROFESSOR OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW

PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW

before the

Joint Special Committee on Security for Judgments

of the Texas Legislature

November 20, 1987

Chairmen and Members of the Committee,

I appreciate the trust that you have placed in me by your request that I address this distinguished audience on matters raised by Senate Concurrent Resolution No. 122, and I welcome the opportunity to provide this synopsis of pertinent Texas law. In particular my remarks will concentrate on constitutional provisions concerning appeals in civil cases and whether the Texas procedure for establishing a supersedeas bond to suspend execution of a judgment pending appeal is in harmony with any such due process guarantees. It is my understanding that all committee members have received a copy of an extensive law review article I recently authored on this subject entitled, "Mandatory Supersedeas Bond Requirements-A Denial of

Due Process Rights?" which appears in Volume 39 of the Baylor Law Review at page 29. Due to time restrictions, my remarks today will summarize its principal conclusions. In addition, I will address amendments to the Texas Rules of Appellate Procedure concerning security on appeal, which were recently ordered by the Texas Supreme Court on recommendation of the Supreme Court Advisory Committee and which technically are effective the first of January, 1988.

I. CONSTITUTIONAL REQUIREMENTS

The Federal Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of law." This language has been construed to mandate that all citizens shall enjoy free and open access to the courts of the United States in order to obtain redress for injury. Due process requires that the opportunity to obtain access to the courts be granted to all litigants "at a meaningful time and in a meaningful manner." Procedural due process is said to insure citizens their day in court by providing notice of the proceeding and an opportunity to be heard. How many courts does a litigant have a right to be heard in a trial court, an appellate court, two appellate courts, the United States Supreme Court? Constitutional due process does not require that individual states provide open access to their appellate courts. This right of access vel non

is wholly within the discretion of the state. Consequently, the right to appellate review is not conferred by the United States Constitution.

II. TEXAS OPEN COURTS PROVISION

Texas provides its citizens with guaranteed rights of appellate access by article I, section 13 of the Texas Constitution. This open courts provision provides that "all courts shall be open, and every person for an injury done him in his lands, goods, person or property shall have remedy by due course of law." The due process pledge enunciated in this section originates from the Magna Carta and ensures that Texas litigants will not unreasonably be denied access to any of the state's courts. The constitutions of thirty-eight states contain similar provisions. This right is a substantive state constitutional right which cannot be compromised by judicial decree, legislative mandate, or rules of procedure..

In order for the right of appeal, as established in the Texas Constitution, to satisfy the requirements of due process, it must afford all litigants with a "fair opportunity" to obtain a "meaningful appeal" on the merits. Absent the guidelines of due process, the right of appeal would be reduced to merely a right of access; appeal becomes a meaningless ritual when the opportunity to effectively present appellant arguments does not exist.

Texas courts have liberally construed laws prescribing procedures for appeal in order to protect this constitutional right. However, liberal statutory construction is unavailable when the law is set forth in clear and unambiguous language.

III. TEXAS PROCEDURE TO OBTAIN A MEANINGFUL APPEAL

A. Cost Bond to Perfect Appeal

When a final judgment is rendered in a civil cause of action in Texas, the Texas procedure provides the judgment debtor with several options: Texas Rules of Appellate Procedure 40 and 41 establish that the judgment debtor has, as a general rule, a thirty day period after the judgment is signed to either perfect his right of appeal, file a motion for new trial or simply let the judgment become final. As soon as the thirty days has elapsed, the rules grant the judgment creditor the right to begin immediate execution upon such judgment.

If the judgment debtor desires to appeal the trial court decision, he must take the appropriate steps to perfect his appeal as set forth by Rule 46 of the Texas Rules of Appellate Procedure. Perfecting appeal requires the execution of a cost bond, also known as an appeal bond, to the clerk of the trial court in the amount of one thousand dollars. The trial court is empowered with the discretionary authority to alter the cost

bond amount should the costs of court vary from that amount. (The cost bond is conditioned on the appellant executing his appeal with effect and paying all costs.)

When the appellant is financially unable to pay the amount of the cost bond, Appellate Rule 40 enables him to preserve his right of appeal by proceeding in forma pauperis and filing with the clerk an affidavit which states that he lacks the necessary financial resources.

The flexibility in the Texas rules prevents payment of a cost bond from being an absolute precondition to the perfection of an appeal, thus allowing the appellant an opportunity for judicial review.

B. Supersedeas Bond to Stay a Money Judgment Prior to Recent Rules Amendments Ordered Effective January 1, 1988.

After an appeal has been perfected, the appellant may suspend enforcement of a trial court judgment in order to preserve the pre-judgment status quo pending completion of the appeal. Although the common law rule was contrary, presently in Texas the filing of an appeal does not work an automatic stay of a money judgment. The losing litigant effectuates a suspension of execution of judgment by filing a supersedeas bond with the trial court, which must be approved by the clerk. Appellate rule 47 currently facially mandates that the amount of bond (or deposit) shall be at least the amount of the

judgment, if a money judgment, interest and costs. The filing of the supersedeas bond suspends the power of the trial court to issue any execution on the judgment and provides security to the judgment creditor for the delay in the enforcement of the judgment. The supersedeas bond does not suspend the validity of the judgment; it only suspends the execution of the judgment against the appellant pending appeal, thereby operating as a stay.

Under appellate rules technically effective until January 1, 1988, unless a supersedeas bond is filed, a money judgment of a Texas trial court is enforceable, and it is the duty of the clerk to pay out any funds in his hands to the judgment creditor and to issue execution pending appeal upon application, notwithstanding that an appeal is perfected and is pending. This is true even though the appellant has timely filed a cost bond. (As previously noted, the cost bond serves a distinctive purpose than the supersedeas bond: the former secures the costs incurred at the trial court, while the latter protects the judgment creditor from dissapation of assets when execution of the judgment is suspended pending an appeal.) Until recently, Texas procedure has necessarily interposed the ability of an appellant to pay a supersedeas bond as a condition precedent to the right to suspend execution of a money judgment pending appeal. This inflexible requirement of posting such a bond to forestall execution of a money judgment coupled with the lack of judicial discretion to examine

circumstances and provide for alternate forms and amounts of security which would adequately protect a judgment creditor, denies an appellant's due process right to an effective appeal as guaranteed by the open courts provision of the Texas Constitution.

Decisions of the Texas Supreme Court construing the open courts provision reaffirm that any law "that unreasonably abridges a justifiable right to attain redress for injuries caused by the wrongful act of another amounts to a denial of due process under Article I, section 13 and is therefore void." Validly enacted rules of civil procedure have the force and effect of law and thus are subject to this same constitutional constraint.

C. Texas Procedure To Stay a Money Judgment Pending Appeal Under Amended Rules Ordered Effective January 1, 1988.

Recently, the Texas Supreme Court ordered that procedural rules providing for the posting of security on appeal be amended effective January 1, 1988. (See attached) Texas Rule of Appellate Procedure 47, subsection b, is amended to empower the trial court with discretion to determine the type and amount of security necessary to suspend enforcement of a civil money judgment pending appeal. Specifically, if the trial court, after notice and hearing, finds that the posting of a supersedeas bond in the amount of the judgment, interest, and

costs will cause irreparable harm to the judgment debtor (the appellant) and that not posting the bond will cause no substantial harm to the judgment creditor (the appellee), the court may condition a stay of the judgment upon the posting of such security, if any, it finds necessary to adequately protect the judgment creditor against loss occasioned by the appeal. This modification to Texas procedure-removing in extenuating circumstances the absolute requirement of posting a bond to forestall execution coupled with the clothing of judicial discretion to provide for alternate security which otherwise will protect the judgment creditor-opens up an efficacious avenue for meaningful appellate review envisioned and guaranteed by the Texas Constitution.

Not only is the appellate courthouse door open for review on the merits of the underlying cause of action, but by virtue of amendments to Texas Rule of Appellate Procedure 49, subsection c, a trial court's order concerning security necessary to suspend enforcement of a civil judgment pending appeal is subject to review on motion as well. The motion is to be heard at the earliest practical time by the intermediate court which is empowered to issue any temporary orders necessary to preserve the rights of the parties; remand to the trial court for any necessary fact findings or taking of evidence; and to order a change in the trial court's order concerning security it finds proper. If additional security is

ordered by the appellate court to suspend enforcement of the judgment, the judgment debtor has twenty days to comply or execution may issue.

An additional significant modification to Texas practice is that amended Texas Rule of Appellate Procedure 47, subsection k, now empowers the trial court with continuing jurisdiction during the appeal, notwithstanding the loss of plenary power, to make orders concerning security on appeal inclulding orders pertaining to the sufficiency of sureties. If changed circumstances mandate, the trial court may modify its earlier order concerning security. Any such order of the trial court is subject to appellate review as discussed above.

Do these amended rules protect the constitutional right of access to a meaningful appellate review? I believe so. In analyzing the constitutionality of the amended Texas supersedeas bond requirement as a prerequisite to stay a money judgment in light of the open court provision, it is necessary to first ascertain the purpose of the alleged barrier to judicial access (here the security requirement) and then balance this purpose against the interference that the rule creates with the ability of a litigant to obtain effective access to Texas appellate courts.

It is clear that the general purpose of the supersedeas bond requirement is to protect the judgment creditor from the dissipation of assets that he is entitled to by the judgment

which may occur as a direct result of a delay in the enforcement of the judgment pending appeal.

The second prong of the open courts provision test traditionally applied by the Texas courts requires a showing that the litigant's ability to access Texas courts is not unreasonably restrained by the rule, statute, or other law under consideration.

A judgment debtor who wishes to appeal the decision of the trial court when the judgment exceeds his financial worth will be able to perfect his right to appeal, but will not possess the capability to file a supersedeas bond to suspend execution of the judgment. A direct relationship between the appellant's deprivation of his property pending appeal and his right to suspend judgment is apparent. However, in balancing the purpose of the obligatory supersedeas bond requirement against the restriction of access to an appeal unfettered by execution on the underlying judgment, it would seem that the restrictions imposed by the supersedeas bond requirements are neither onerous nor unreasonable. One must be mindful that the appellant has had his day, at least before the trial court with the commensurate opportunity to present evidence and be heard, yet was unsuccessful. The property rights of the successful litigant in the ordered recovery must be considered as well. Reasonable procedural provisions to safeguard litigated property rights have been judicially sanctioned by the United States Supreme Court. Further, execution on a money judgment

pending appeal does not moot the appeal or require dismissal of the appeal. If the judgment of the trial court is reversed on appeal, the judgment creditor is liable to the appellant in restitution. Mandatory supersedeas bond requirements do not result in the denial of an appellant's due process rights when the appellant lacks the financial ability to post adequate security to protect the appellee and execution on the judgment transpires pending the appeal.

A different conclusion would be mandated under the procedural scheme in Texas prior to the recent amendments to Appellate rules 47 and 49 if the judgment debtor were rigidly and absolutely required to post a supersedeas bond in the amount of the judgment, interest and costs when the judgment debtor would be seriously injured by this precondition to forestall execution AND could by the posting of alternate security otherwise protect the judgment creditor. This prior practice created the potential for an unreasonable precondition which would deny access to an effective appeal. Under the amended scheme however, whereby both the trial court and the appellate court on review may order alternate security which protects the successful trial court litigant and also forestalls execution, the absolute and unreasonable precondition is removed.

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

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(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

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KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 11, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 51

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding TRAP 51. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

COAS Disappearance
J. Thurmond Jensen

0025

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

CHIEF JUSTICE
MAX N. OSBORN

JUSTICES
CHARLES R. SCHULTE
LARRY FULLER
JERRY WOODARD

CLERK
BARBARA B. DORRIS

DEPUTY CLERK
DENISE PACHECO

STAFF ATTORNEY
JAMES T. CARTER

May 4, 1988

HJH,
SOAC Supp
+ Agenda
+ Justice Hecht.
+ COAJ Pkt

Mr. C. Raymond Judice,
Administrative Director
Office of Court Administration
Texas Judicial Council
1414 Colorado, Suite 602
P.O. Box 12066
Austin, Texas 78711-2066

RE: Model Transcripts

Dear Ray:

This will acknowledge receipt of your letter of April 25, 1988 and the enclosed model transcripts for both criminal appeals and civil appeals. Obviously, you and those in your office have done considerable work in preparing these model transcripts and I commend you for a job well done. I write not to complain about the model transcript, but one of the Appellate Rules which in my opinion misplaces responsibility with regard to the preparation of the transcript and results in many unnecessary documents being in a transcript.

As originally written, Tex.R.Civ.P. 376 required the attorneys to file a written designation of the instruments to be included in the transcript. An amendment in 1978 relieved the lawyers of that responsibility and placed the burden upon the clerk and required the clerk to include, among other things, "the material pleadings upon which the trial was had without unnecessary duplication." At the present time, Tex.R.App.P. 51 requires the clerk to include, among other things, "the live pleadings upon which the trial was held."

I still believe that the lawyer should bear the responsibility of bringing to the Appellate Court those instruments from the trial court which they believe are necessary for the appeal.

That belief was expressed in my concurring opinion in Texas Employers Insurance Association v. Stodghill, 570 S.W.2d 398 at 401. The Appellate Courts are not running a kindergarten, and we should treat the attorneys as professionals and expect them to measure up as professionals and bear the responsibility for designating a proper transcript. Your model transcript for civil appeals includes pages I-5 and I-6 as instructions of what should and should not be in a transcript. I do not believe the burden of making that determination should fall upon a clerk who knows nothing about the case but should be borne by the attorney who should know everything about what is necessary for the appeal.

We constantly receive transcripts with many excessive documents totally unnecessary for the appeal, but which were obviously included by the clerk who did not know and should not have known whether those documents were necessary or not. Generally, a transcript will include any briefs or legal memorandums filed with the trial judge. The Supreme Court in Litton Industries Products, Inc. v. Gamage, 668 S.W.2d 319, said those briefs should not be brought forward in a transcript. Tex.R.Civ.P. 376-a so provided. I do not find where that provision now exists in any appellate rule and obviously the district clerks have no direction about including briefs and memorandums in the transcript.

In summary, I would say that all of your directions about preparing a transcript could be avoided if we would only put the responsibility for designating transcripts upon those who ought to have that responsibility and not upon the clerk who is totally unfamiliar with the case. I realize any change would have to come from the Supreme Court and not from your office, and therefore I am sending a copy of this letter to Justice Kilgarlin and Chief Justice Austin McCloud.

Sincerely,

Max N. Osborn

Max N. Osborn,
Chief Justice

MNO:st

cc: Justice William Kilgarlin
Chief Justice Austin McCloud

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WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 20, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 51(c)

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Appellate Rule 51(c). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Honorable Joe R. Greenhill

Copy to Litz
Orig to file
9-17-88 tgh

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 15, 1988

HJH,
TRAP Supc
COA
SCAC Agenda

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

The clerk of the Waco CA forwarded to me the enclosed opinion. I think you'll agree that Tex. R. App. P. 51(c) could use some altering.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

In The

Court of Appeals

For The

First District of Texas

NO. 01-88-00391-CR

MARLIN COLE, Appellant

V.

THE STATE OF TEXAS, Appellee

ORDER

Appellant Marlin Cole has filed a motion to transfer[1] his case to the Tenth Judicial District in Waco. He complains of the action of the district clerk in forwarding the notice of appeal to this Court after he had designated the Tenth Court of Appeals on his notice of appeal filed in the 272nd District Court of Brazos County.

Brazos County stands in the unique position of being the only county in

---

1 Motion to transfer is somewhat of a misnomer. The Texas Supreme Court is given the authority to order transfers "from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer." Tex. Gov't Code Ann. sec. 73.001 (Vernon Pamph. 1988). The First and Fourteenth Courts are also given authority to transfer cases from one court to another to equalize the dockets. Tex. Gov't Code Ann. sec. 22.202(i) (Vernon Pamph. 1988). We are treating the appellant's motion as one asking us to return the appellate file to the clerk of Brazos County.

Texas that is included within three appellate districts. The First, Tenth, and Fourteenth District Courts of Appeals all have jurisdiction over appeals from Brazos County. Tex. Gov't Code Ann. sec. 22.201(b), (k) & (o) (Vernon Pamph. 1988).

The Government Code provides for a procedure for random selection of all "civil and criminal cases directed to the First and Fourteenth Court of Appeals." Tex. Gov't Code Ann. sec. 33.303(h) (Vernon Pamph. 1988); see also Avis Rent A Car v. Advertising & Policy Comm., 751 S.W.2d 257 (Tex. App.--Houston [1st Dist.], 1988) (motion to transfer). Tex. Gov't Code section 33.303(h) provides:

> The trial clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container. When a notice of appeal or appeal bond is filed, the trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case and any companion cases to the court of appeals for the corresponding number drawn.

The Government Code does not expressly address the situation presented in Brazos County.

Appellant argues that his designation of the Tenth District Court of Appeals was binding under Tex. R. App. P. 51(c). Rule 51(c), which pertains to the appellate transcript, states, in part:

> Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant.[2]

---

[2] Tex. R. App. P. 51(c) is derived from former Tex. R. Civ. P. 376 (Vernon 1985) (since repealed). Rule 376 stated that "upon perfection of an appeal or writ of error..., the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit to the appellate court designated by the appealing party a true copy of the proceedings in the trial court...."

The "designation" language found in rule 51(c) does not empower the appellant to choose his appellate court. Under appellant's logic, rule 51(c) would give Brazos County appellants, but none other in Texas, the right to "forum shop" by "designating" the appellate court. This is not the intent of rule 51(c), which is concerned with the transmission of the transcript, not the assignment of the appeal.

We find no authority indicating that a Brazos County litigant has a greater right than a litigant from any other Texas county to choose the appellate court that will hear his appeal. Therefore, the motion to transfer is denied.

PER CURIAM

Panel consists of Justices Warren, Duggan, and Levy.

Publish. Tex. R. App. P. 90.

ORDER ENTERED: July 28, 1988

True copy attest:

/s/ Kathryn Cox

Kathryn Cox
Clerk of the Court

00261

LAW OFFICES

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January 18, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 53(j)(1) and (2)

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Anna M. Donovan, Official Court Reporter for 111th District Court in Laredo, Texas. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton
Ms. Anna M. Donovan

Hold,
COA J
SCAC SubC
SCAC agenda
Note to Anna that we have referred it & Xcs of transmittal ltrs.

ANNA M. DONOVAN
OFFICAL COURT REPORTER
111th JUDICIAL DISTRICT
P.O. BOX 29
LAREDO, TEXAS 78042-0029

Certified Shorthand Reporter

Telephone:
(512) ~~727-7272~~ 721-2668
~~Extension 872~~

January 13, 1989

Mr. Luther H. Soules III
Attorney at Law
Republic of Texas Building, 10th Floor
175 E. Houston Street
San Antonio, TX 78205-2230

Re: Free Statement of Facts for indigent parties in civil cases

Dear Mr. Soules:

I wrote to you on October 4, 1988, with reference to the predicament facing court reporters having to provide free Statements of Facts to indigent parties in civil cases. To this date I have received no response or acknowledgement to my letter.

Since this is a new year, I am again appealing to you to read my letter with its attachments -- I am enclosing a complete copy -- and to read Rule 53(j)(1) and (2) of the Rules of Appellate Procedure. The stark contrast between the two rules is clear; in one the county pays, in the other it does not. The court reporter suffers.

Yours very truly,

Anna M. Donovan

Anna M. Donovan
111th District Court Reporter

Enclosures

Xc: Hon. A. A. Zardenetta
Judge, 111th District Court

Hon. Joe E. Kelly
Presiding Judge
Fourth Administrative District
P. O. Box 2502
Victoria, Texas 77902

Hon. Manuel Flores
Judge 49th District Court

Hon. Elma T. Salinas Ender
Judge, 341st District Court

JOE E. KELLY
Presiding Judge
FOURTH ADMINISTRATIVE JUDICIAL REGION
P.O. Box 2502
Victoria, Texas 77902

(512) 576-5092

October 7, 1988

Mrs. Anna M. Donovan
Official Court Reporter
111th Judicial District
P. O. Box 29
Laredo, Texas 78042-0029

Dear Mrs. Donovan:

Your letter of October 4th regarding "free court reporters" was very timely. I took the liberty of discussing this with my fellow Presiding Judges last week at our Judicial Conference meeting. Your subject being an appellate procedure rule apparently requires attention of the Supreme Court which is not likely to be able to give this and similar matters attention until after the first of the year. I am rather surprised at the apparent lack of interest on the part of other reporters.

I hope to visit with you the latter part of October. I tried to reach you by phone without success.

With kind personal regards, I am

Yours very truly,

Joe E. Kelly

JEK/llm

cc: Mr. Luke Soules III

00264

ANNA M. DONOVAN
OFFICAL COURT REPORTER
111th JUDICIAL DISTRICT
P.O. BOX 29
LAREDO, TEXAS 78042-0029

Telephone:
(512) 727-7872
Extension 672

Certified Shorthand Reporter

October 4, 1988

Mr. Luther H. Soules III
Attorney at Law
Republic of Texas Building, 10th Floor
175 E. Houston Street
San Antonio, TX 78205-2230

Dear Mr. Soules:

Judge Zardenetta suggested that I write or call you with reference to the dilemma facing court reporters having to prepare statements of facts in civil cases on appeal when the appellants are found to be indigent -- that the court reporter receives no pay for preparing the statement of facts.

I am the Official Court Reporter for the 111th District Court which handles strictly a civil docket. The instances are increasing where indigents are appealing jury verdicts and court rulings in civil cases. Webb County, of course, has refused to pay as per Rule 53(j)(1) of the Rules of Appellate Procedure. However, Rule 53(j)(2), referring to criminal cases, provides that the county pay the court reporter for the statement of facts when the criminal is indigent. Why the disparity? Why the discrimination? And furthermore, isn't ordering a person to work for free a violation of human rights? Slavery was outlawed long ago.

It seems to me that somewhere along the line as this rule evolved, someone missed the intent of the rule, that is, for the indigent appellant in a civil case not to have to pay for the statement of facts, and may have interpreted it "...the court reporter shall receive no pay for same." They could easily have left out "...shall receive no pay for same <u>from indigent appellants</u>." I feel that would clear the way for the county to pay the court reporters for statements of facts in indigent civil cases just as they do for indigent criminal cases.

This dilemma has generated not only sympathy for the plight of the unfortunate court reporter reporting an indigent civil action, but has also produced outrage at such unfair treatment of court reporters who are instrumental in expediting the

court's work. To quote Judge Joe Kelly from Victoria, Texas, he wrote to the Honorable John Hill, Chief Justice of the Supreme Court of Texas, and said "...we still have servitude without compensation." A copy of his letter is enclosed. I also attach other correspondence relating to this problem.

I don't know if you can help me or if filing a lawsuit is the only way to resolve this, or if I could even afford to hire a lawyer to file a lawsuit. I seem to be the one hardest hit in this area, since the 111th District Court handles the greater number of civil cases in Webb County. Other court reporters will not begin to scream until they are hit for a free statement of facts. Hopefully, it will not be a long trial.

Court Reporters do have the opportunity to contest the indigency of appellants, and I have contested two. I lost one and won the other for the time being. I have been an Official Court Reporter for fifteen years, having reported for Judge E. James Kazen during his last six years on the Bench, and then for Judge Ruben Garcia during his two terms in office. I have been reporting for Judge Antonio Zardenetta for two years. I enjoy my work, although it is demanding, challenging, often excruciatingly tense when you have to stretch the workday to more than twenty-four hours in order to meet deadlines, but despite the grumbling, we perform our duties. But the bottom line is: to order us to work for free is too, too much. This rule should be amended to coincide with its counterpart on criminal cases where the county pays for the statement of facts for indigents.

Because of your work with the Bar's Committee on Administration of Justice, I feel that you are the most appropriate person to approach with this problem, other than those who make the rules.

Thank you for your attention.

Yours very truly,

Anna M. Donovan
111th District Court Reporter

Enclosures
cc: Hon. A. A. Zardenetta
Judge, 111th District Court

Hon. Joe E. Kelly
Presiding Judge
Fourth Administrative Judicial Region
P. O. Box 2502
Victoria, TX 77902

Antonio A. Cardenella
DISTRICT JUDGE
[illegible]
LAREDO, TEXAS 78040
AC 512 / 727-7872

September 1, 1987

Hon. Andres "Andy" Ramos, Jr.
Webb County Judge
Webb County Courthouse
Laredo, Texas 78040

Hon. Judith Zaffirini
State Senator
1407 Washington
Laredo, Texas 78040

Hon. Joe E. Kelly, Pres. Judge
Fourth Administrative Judicial Region
P. O. Box 2502
Victoria, Texas 77902-2502

Hon. Henry Cuellar
State Representative
1407 Washington
Laredo, Texas 78040

Re: Preparation of Statements of Facts in Civil Cases due to Indigency

Dear Judges, Senator and Representative:

Enclosed please find a letter and bill submitted to Webb County by my Court Reporter, Ms. Anna Donovan, for the services she performed in this case. Her letter is self-explanatory on this very serious problem confronting our Court Reporters in what may not be an isolated case. Considering the rights of persons to file lawsuits in forma pauperis, engage the services of Counsel on a contingency basis, and thereafter proceed through the appellate process, again, in forma pauperis, and the per capita income along our border towns, and the fact that for all practical purposes, their indigency, or lack of same, is not determined until after trial and before appeal -- considering all of the foregoing, cases similar to the one here in question may become the rule rather than the exception.

Taken in the light most favorable to the present law that disallows county payment for these Statements of Facts, the situation is manifestly and grossly unfair and discriminatory, to say the least. As a practical matter, if these cases, again, become the

rule, as clearly appears to be the pattern, the Courts administering these type of cases will have, and presently, have no other alternative but to engage the services of deputy court reporters to take in-court proceedings, thereby allowing the Official Court Reporters time to prepare these voluminous, time consuming and extremely costly Statements of Facts, which have to be timely filed with the Appellate Court that does not countenance undue delays, but wants and expects these Statements of Facts to be filed with them on a timely basis, as the Rules dictate; all of this considerable expense of the deputy court reporters, I might add, to be borne by the County, in any event, as it is not humanly possible for the Official Court Reporter to, simultaneously, be in Court, daily reporting in-court work, as the Court Administration mandates of all Courts, to expedite and dispose of their dockets pursuant to the time standards of the Act, V.A.T.C.S. Art. 200a-1, and, also, working, preparing and timely filing, as the Texas R.C.P. mandate, all the Statements of Facts with the Appellate Court. The problem is a serious one that will not go away. It is being faced by Judges and Court Reporters in civil proceedings all too frequently.

In view of the foregoing, it is obvious that the judges must have the means and funds to employ the necessary deputy court reporters so that the Appellate Courts may timely receive their Statements of Facts, the Courts can expeditiously move and dispose their ever-increasing dockets and the Court Reporters can, at least, be afforded the time necessary to prepare and timely file the Statements of Facts with the Appellate Court.

I am earnestly requesting the support of our Hon. Judith Zaffirini and the Hon. Henry Cuellar to create and support legislation that will correct this inequity in a critical portion of our judicial process, and enlist the combined support and assistance of our judiciary and bar associations, in the best interests of fairness and justice.

Sincerely,

ANTONIO A. ZARDENETTA

Z/eem.
encl.

Xc. Hon. Joe B. Evins, Judge, 5th Administrative Judicial Region
Hon. Elma T. Salinas Ender, Judge, 341st District Court
Hon. Manuel R. Flores, Judge 49th District Court
Hon. Raul Vasquez, Judge, County Court-at-Law
Hon. Richard G. Morales, Sr., Webb County Attorney
Mr. Manuel Gutierrez, District Clerk, Webb County
Mr. Henry Flores, County Clerk, Webb County
Mr. Richard G. Morales, Sr., Pres., Laredo Bar Association
Mr. Armando X. Lopez, Pres., Laredo Young Lawyers Association

ANNA M. DONOVAN
OFFICAL COURT REPORTER
111th JUDICIAL DISTRICT
P.O. BOX 30
LAREDO, TEXAS 78042-0030

Telephone:
(512) 727-7572
Extension 672

Certified Shorthand Reporter

August 31, 1987

Mr. Bert Martinez
Webb County Auditor
Webb County Courthouse
Laredo, TX 78042

Dear Mr. Martinez:

I enclose a copy of my invoice for a two-volume Statement of Facts that I prepared at the request of the Court and based on the finding of indigency of the defendant/appellant.

This again raises the question of payment for such Statements of Facts in civil cases wherein the appellant is indigent and so found by the Court. It is unbelievable in this day and age (slavery having been abolished long ago) that there is a law or an interpretation of a law that says a person is forcibly to work for free. You informed me that the County Attorney had issued an opinion on "free Statements of Facts in civil cases for indigent appellants," but I have not been given a copy of said opinion.

RULE 53 reads as follows: "Section (j) FREE STATEMENT OF FACTS.

(1) Civil cases. In any case where the appellant has filed the affidavit required by Rule 40 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter to prepare a statement of facts and to deliver it to the appellant, but the court reporter shall receive no pay for same.

(2) Criminal cases...if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge."

My question is: Why the discrimination? It is the duty and obligation of court reporters to prepare statements of facts upon request. The reporter has no choice! Discrimination is defined as "to act toward someone or something with partiality or prejudice; to draw a clear distinction..." To force anyone to work for free is slavery, a clear violation of civil rights.

Our welfare system provides sustenance for non-workers. Are workers/public servants, such as court reporters, to be penalized by a flaw in the law that says reporters are to provide services free of charge? Will the Internal Revenue Service permit credit for charitable work we are forced to do? I doubt it. Charitable work is voluntary, not mandatory.

The bottom line is that I am submitting my bill to Webb County for payment in preparing the Statement of Facts in a civil case wherein indigency of the appellant was determined.

Yours very truly,

Anna M. Donovan

Anna M. Donovan, C.S.R.
111th District Court Reporter

CC: Hon. Andres Ramos
Webb County Judge

Mr. Richard G. Morales, Sr.
County Attorney, Webb County

ANNA M. DONOVAN
OFFICAL COURT REPORTER
111th JUDICIAL DISTRICT
P.O. BOX 89
LAREDO, TEXAS 78043-0089

Certified Shorthand Re[illegible]

(512) 727-7573
Extension 672

REJECTED
WEBB COUNTY AUDITOR'S OFFICE
SEPT. 2, 1987

I N V O I C E

Date: August 31, 1987

To: Webb County
c/o Webb County Auditor
Webb County Courthouse
Laredo, TX 78042

Description	Amount
Preparation of: Original and one (1) copy of Volumes 1 & 2 comprising Statement of Facts (including reproduction of exhibits) in Cause No. 37,165, styled Andres Cruz and Josefa Cruz vs. Elsa C. Alvarado and Miguel Alvarado.....	$1425.00

(Payable upon receipt)

00271

JOE E. KELLY
Presiding Judge
FOURTH ADMINISTRATIVE JUDICIAL REGION
P.O. Box [illegible]
Victoria, Texas 77902

(512) 576-[illegible]

September 21, 1987

Honorable John Hill
Chief Justice, Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Court Reporter Compensation; Indigent Cases

Dear Chief Justice Hill:

It was indeed a pleasure to visit with you last Thursday. Due to scheduling we did not have an opportunity for "small talk". Needless to say I join your many friends and dedicated supporters extending my regrets to learn of your decision to leave the Court. Certainly I can understand your reasoning. In fact I have wondered the last twenty-five years why I quit a wonderful law firm to become a part of 19th century prodeedings. Be that as it may, I do have a matter to call to your attention.

The enclosed letter from Mrs. Anna M. Donovan is self explanatory. It does appear we still have servitude without compensation. I shall not burden you with summarizing my thoughts on the contents of the letter. It states the case better than I could ever relate.

My only question, do you have any suggestions as to how this highly unfair and burdenable practice may be rectified? I realize the Rules must be amended, my question is really how to gather enthusiasm for early action thereon.

With all best wishes for your future success, I am

Sincerely yours,

Joe E. Kelly

JEK/llm

cc: Honorable Antonio A. Zardenetta
Mrs. Anna Mr. Donovan

00272

ANNA M. DONOVAN
OFFICIAL COURT REPORTER
111th JUDICIAL DISTRICT
P.O. BOX 8
LAREDO, TEXAS 78041-0027

Telephone
[illegible]

Certified Shorthand Reporter

September 22, 1987

Hon. Joe E. Kelly
Presiding Judge
Fourth Administrative Judicial Region
P. O. Box 2502
Victoria, TX 77902

Dear Judge Kelly:

Thank you for the copy of your letter to Chief Justice Hill supporting my views on Court Reporter Compensation-Indigent Cases (civil).

In the past I have often joked about someday having to pay Webb County to work for them -- maybe that day has arrived since the new county administrators have talked about court reporters having to pay for use of equipment, supplies, etc.

Seriously though, I do appreciate your interest in our problem of being forced to work for free.

Judge Zardenetta has been very supportive in listening to our woes and informing county officials and our legislators of this problem, but what more can I say -- your letter has made my day!

Sincerely yours,

Anna M. Donovan, C.S.R.
111th District Court Reporter

cc: Judge Zardenetta

JOE E. KELLY
Presiding Judge
FOURTH ADMINISTRATIVE JUDICIAL REGION
P.O. Box 2982
Victoria, Texas 77902

(512) 576-5092

November 9, 1987

Mrs. Anna Donovan
Court Reporter
111th District Court
Laredo, Texas 78040

Dear Mrs. Donovan:

There seems to be no particular activity afoot concerning the free record for alledged indigent civil parties for appeal. I believe this should be taken up with your Court Reporters Association to gain some attention. Frankly I am indebted to you for calling the rule to my attention. I did not know of its existence and wonder how it got by the Court Reporters Association in the first instance.

With kind personal regards, I am

Yours very truly,

Joe E. Kelly

JEK/llm

00274

Antonio A. Zardenetta
DISTRICT JUDGE
[illegible] JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40, Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

R E S O L U T I O N

WHEREAS, on June 1, 1988, the Webb County Board of Judges convened and were present at a duly called meeting of the Court Administration Act, Article 200(a), V.A.T.C.S., wherein the Board duly considered and unanimously agreed that this resolution be prepared and conveyed to the Hon. Judith Zaffirini, State Senator, and to the Hon. Henry Cuellar, State Representative, to request their assistance in correcting the present law: Texas Rules of Civil Procedure 145, concerning Affidavit of Inability to Pay Court Costs, so that said rule may allow and permit the Official Court Reporter of any State court and/or the District Clerk of any county to contest the pauper's affidavits being filed at the District Clerk's office, all as previously provided in T.R.C.P. 145 prior to its recent amendment disallowing this contest by the Court Reporter and District Clerk; and

WHEREAS, the Board of Judges, by this resolution, do not in any way, form or fashion wish or intend to deny free access to our judicial system to truly indigent persons needing relief from our courts, but the Judges feel it necessary and would like to see a rule that would allow some fair and reasonable scrutiny of these affidavits to truly determine the legitimateness of indigency, especially if the pauper's affidavit, at the inception of a lawsuit, forms the basis, in whole or in part, for the pauper's later desire to appeal the proceedings and to secure a free Statement of Facts from the Court Reporter without paying for same and the Court Reporter not being compensated for her services by any means, which is in

stark contrast to the granting of compensation for Court Reporters for preparing the Statement of Facts in criminal proceedings, all as stated in the Texas Rules of Appellate Procedure, Rule 40, and in Rule 53(j) Free Statement of Facts; and

WHEREAS, the Board of Judges further wish to convey this resolution to the appropriate Advisory Committee for the Rules of Civil Procedure of the Supreme Court of Texas so that the Committee may duly consider these concerns of the Judges and their request herein expressed; and now, therefore,

BE IT RESOLVED that the Board of Judges of Webb County, Texas, by virtue of Article 200(a), V.A.T.C.S., unanimously agree and resolve that this resolution be approved and conveyed to the Hon. Judith Zaffirini and the Hon. Henry Cuellar, and to the Advisory Committee of the Supreme Court of Texas for the Rules of Civil and Appellate Procedure so that all combined will be able to secure a fair, just and reasonable compromise to the matters and the issues as expressed in this resolution.

RESOLVED at Laredo, Webb County, Texas, this the 6 day of July, 1988.

Antonio A. Zardenetta, Judge,
111th District Court

Manuel R. Flores, Judge,
49th District Court

Elma T. Salinas Ender, Judge,
341st District Court

Raul Vasquez, Judge,
County Court-at-Law, Webb County

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

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WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 40 and 53(j)

Dear Rusty:

Enclosed herewith please find a copy of a letter I received from Justice William W. Kilgarlin regarding Texas Rules of Appellate Procedure 40 and 53(j). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Honorable Antonio A. Zardenetta

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

August 17, 1988

HJH
SCAC Subcom TRCP 145
& TRAP
Agenda at Both.
Z

Hon. Antonio A. Zardenetta
111th Judicial District
Laredo, Texas 78040

Dear Judge Zardenetta:

I am in receipt of your letter of May 19, 1988 regarding the proposed changes to the Rules of Civil Procedure, and I appreciate your taking the time to write.

I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

00284

Antonio A. Zardenetta
DISTRICT JUDGE
111TH JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40, Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

00285

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

PROPOSED CHANGE TO RULE 79, TEX.R.APP.P.

RULE 79. PANEL AND EN BANC SUBMISSION.

(a) Except as provided in section 22.223 of the Government Code and these rules, original submission of civil and criminal cases in a court of appeals shall be to a panel of the court consisting of three justices. A majority of the panel shall constitute a quorum and the concurrence of a majority of the panel shall be necessary for a decision. Except as otherwise provided in these rules, the decision of a panel of the court of appeals shall constitute the final decision fo the court.

(b) If for any reason only two justices participate in the decision of a panel of a court of appeals consisting of more than three justices and they cannot concur in a decision because they are equally divided, the Chief Justice of the Court of Appeals shall designate another justice of the court to participate in the decision of the case. After such justice is designated, the panel may order the case reargued, at its discretion. In the alternative, the Chief Justice of the Court of Appeals may convene the court en banc for the purpose of deciding the case. The en banc court may order the case reargued at its discretion.

(c) If a court of appeals consists of only three justices and for any reason only two justices participate in the decision and they cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired

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justice to participate in the decision of the case pursuant to law. The reconstituted panel may order the case reargued, at its discretion.

se is submitted to an en banc court, rehearing or otherwise, a majority of court shall constitute a quorum and the ity of the court sitting en banc shall sion. If a majority of the justices of anc cannot concur in a decision because ed, such fact shall be certified to the upreme Court who may temporarily assign ourt of appeals or a qualified retired in the decision of the case pursuant uted en banc court may order the case tion.

rehearing en banc is not favored and ~~except in extraordinary circumstances~~ ion by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. A vote need not be taken to determine whether a cause shall be heard or reheard en banc unless a justice of the en banc court requests a vote. If a vote is requested and a majority of the membership of the en banc court vote to hear or rehear the case en banc, the case will be heard or reheard en banc; otherwise, it will be decided by a panel of the court.

00289

justice to participate in the decision of the case pursuant to law. The reconstituted panel may order the case reargued, at its discretion.

(d) Where a case is submitted to an en banc court, whether on motion for rehearing or otherwise, a majority of the membership of the court shall constitute a quorum and the concurrence of a majority of the court sitting en banc shall be necessary to a decision. If a majority of the justices of the court sitting en banc cannot concur in a decision because they are equally divided, such fact shall be certified to the Chief Justice of the Supreme Court who may temporarily assign a justice of another court of appeals or a qualified retired justice to participate in the decision of the case pursuant to law. The reconstituted en banc court may order the case reargued, at its discretion.

(e) A hearing or rehearing en banc is not favored and should not be ordered unless ~~except in extraordinary circumstances, or~~ consideration by the full court is necessary to secure or maintain uniformity of its decisions, ~~or (2) when~~ the proceeding involves a question of exceptional importance. A vote need not be taken to determine whether a cause shall be heard or reheard en banc unless a justice of the en banc court requests a vote. If a vote is requested and a majority of the membership of the en banc court vote to hear or rehear the case en banc, the case will be heard or reheard en banc; otherwise, it will be decided by a panel of the court.

or in other extraordinary circumstances.

00289

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WRITER'S DIRECT DIAL NUMBER:

TELEFAX

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(512) 224-7073

AUSTIN
(512) 327-4105

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SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 24, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 79

Dear Rusty:

Enclosed herewith please find a copy of a letter forwarded to me by Justice Michol O'Connor regarding TRAP 79. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton
Honorable Michol O'Connor

00290

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

MICHOL O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

April 20, 1989

4/24 HJH,
COAs
SCAC Seal C
~~CJN~~
SCAC agenda,
RC Justice O'Connor

Dear Luke:

Here is the rule
I told you I would send.
Please call me if you have
any question.

Yours truly,

Michol O'Connor

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

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TELECOPIER
(512) 224-7073

May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

THE SUPREME COURT C

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY

P.O. BOX 12248 CAPITOL STATIC
AUSTIN, TEXAS 78711
(512) 463-1312

JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

May 15, 1989

I, Esq.

laza, 19th Floor
reet
05-2230

e on the Advisory Committee's next agenda the
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arding TRCP 267 and TRE 614: May "the rule"
depositions?

arding TRCP 330: Should there be general
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es prescribing some sort of comity for
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. Regarding TRAP 90(a): Should the courts of
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evidence whenever the issue is raised, unless the
f appeals finds the evidence legally insufficient?

. Regarding TRAP 130(a): What is the effect of
an application for writ of error before a motion
hearing is filed and ruled upon by the court of

00293

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals l
the case immediately upon the filin
for writ of error, or may the appell
later-filed motion for rehearing,
involves a material change in the
judgment? *See Doctors Hospital Facil*
of Appeals, 750 S.W.2d 177 (Tex. 19

Two additional matters I would a
considering are whether to incorporate
conduct, such as those adopted in *Don*
Commercial Savings and Loan Ass'n, 121 F.
and whether the electronic recording ord
the rules.

Also, please include on the agenda
enclosed correspondence.

Thank you for your dedication to t
rules.

Sincerely,

Nathan L. H
Justice

Recommend Supct. pursue rules of professionalism

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

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MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

TRAP

Rule 100. Motion and Second Motion for Rehearing

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within ~~fifteen days after such decision is issued~~ [the period of the court's plenary jurisdiction] with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) by written order issued within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

COMMENT: This amendment clarifies this rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals.

TRAP 100

Court recom adopted

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September 16, 1988

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rules of Appellate Procedure 100

Dear Rusty:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding TRAP 100. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Honorable Joe R. Greenhill

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

Rule 121. Mandamus, Prohibition and Injunct

(a) (No change)

(1) (No change)

(2) (No change)

(A) (No change)

(B) If any judge, court person or entity [~~respondent~~] in the discharge public character is required by law to be ma ~~respondent,~~] the petition shall disclose th the cause below and the real parties in inte whose interest would be directly affected b event, the caption of the petition shall, judge, court, tribunal or other person discharge or duties of a public characte respondent the parties to the cause below wh proceeding according to their respective alignment in the matter. The body of the petition shall state the name and address of each petitioner and respondent (including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character) and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of a public character.

(No other changes in the rule).

TRAP 121

Union Ms Clause

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) (No change)

(1) (No change)

(2) (No change)

(A) (No change)

(B) If any judge, court, tribunal or other person or entity [~~respondent~~] in the discharge of duties of a public character is required by law to be made a party [~~named as respondent,~~] the petition shall disclose the names of the parties to the cause below and the real parties in interest, if any [~~or the party~~] whose interest would be directly affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal or other person or entity acting in the discharge or duties of a public character, name as petitioner or respondent the parties to the cause below who would be affected by the proceeding according to their respective alignment in the matter. The body of the petition shall state the name and address of each petitioner and respondent (including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character) and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of a public character.

(No other changes in the rule).

COMMENT: The proposed amendment eliminates a misleading impression created by the existing rule. Under the current version of subdivision (a)(2)(B) the judge or the court involved is named as respondent. This creates the erroneous impression in the minds of the public that the judge or court is being sued in the traditional sense. An even more serious problem arises where a trial judge files a petition for mandamus against a court of appeals in the Supreme Court to seek "review" of the respondent's previously rendered order granting a litigant's petition for mandamus filed in the respondent court. As Judge Michael Schattman so aptly stated: "This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations."

The proposed amendment requires the caption to name as petitioner the parties to the cause below adversely affected by the court's action complained of, instead of the actual petitioning judge, if any, and the name of the respondent to be that of the parties to the cause below favored by such action, instead of the actual respondent judge or court. In situations where there is no party to the cause below aligned with the actual petitioner or respondent who is a public official or entity, such as where no law suit is pending and the petition is directed to an executive officer or some agency official, that officer or official would be the named respondent in the caption as well as disclosed in the body of the petition as the actual respondent.

An example of a real party in interest as defined in the proposed amendment is a child who is the subject of a motion to modify child support and the managing conservator has filed a petition for mandamus to compel the trial judge to transfer the cause to the county of the child's residence. The child's name and address must be disclosed in the petition. The managing conservator is the actual petitioner and the petitioner named in the caption. The trial judge is the actual respondent, but the possessory conservator is named as respondent in the caption because he is the party to the cause below who was favored by the trial court's action, i.e., the denial of the motion to transfer.

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June 14, 1988

Mr. Rusty McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Rules of Appellate Procedure

Dear Rusty:

I have enclosed comments sent to me by J. Shelby Sharpe regarding proposed changes to Rule 15a, Rule 121, and Rule 182, Texas Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Joe R. Greenhill

Copy to LHS
Orig to File
6-1-88
hjh

LAW OFFICES OF
J. Shelby Sharpe

2401 TEXAS AMERICAN BANK BUILDING
FORT WORTH, TEXAS 76102
(817) 338-4900
429-2301 METRO

SCAC
Subc -

May 25, 1988

Mr. R. Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Dear Doak:

Enclosed you will find in appropriate form recommended changes to Rule 15a, Rule 121 and Rule 182, Texas Rules of Appellate Procedure, as per the discussion of the Committee on Administration of Justice at its May 7, 1988 meeting. The Committee can take final action on these proposed changes at the June 4, 1988 meeting.

By copy of this letter, I am sending a copy of these to the other members of my subcommittee, Luther Soules and retired Chief Justice Joe R. Greenhill.

Very truly yours,

Shelby

J. Shelby Sharpe

JSS:cf

cc: Professor Jeremy C. Wicker
Chief Justice J. Curtiss Brown
Luther H. Soules
Honorable Joe R. Greenhill

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

November 2, 1987

Luther H. Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, Texas 78205

Re: Mandamus and Rule 121,
T.R.A.P.

Dear Luke:

This is out of my balliwick, but that never stopped me before. We need to do something about the styles in mandamus practice. It is bad enough to have XYZ Corp. v. Hon. Fred Smith. Now we have judges versus judges: Hon. John F. Dominquez v. Thirteenth Court of Appeals; Hon. John Street v. Second Court of Appeals, and so on. This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations.

The style should reflect the real parties in interest either by identifying only the party seeking the writ as in Ex rel XYZ Corp. or by the federal approach of the seeker versus the resister: XYZ Corp. v. Paul Payne.

Can someone look into this?

Very truly yours,

Michael D. Schattman

MDS/lw

xc: R. Doak Bishop
J. Shelby Sharpe

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SAVANNAH L. ROBINSON
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WILLIAM T. SULLIVAN
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WRITER'S DIRECT DIAL NUMBER:

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: TRAP 123

Dear Rusty:

Enclosed please find a copy of a fax sent to me by Chief Justice J. Curtiss Brown regarding Rule 123. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan L. Hecht
Honorable Stanley Pemberton
Chief Justice J. Curtiss Brown

00324

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
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Operator Telephone Number: (713) 659-3222

To: Luke Soules

Company Name:

Facsimile Number: 512-224-7073

PLEASE CALL THE OPERATOR IF THE FOLLOWING DOCUMENTS ARE NOT LEGIBLE. (713) 659-3222

From: Drew Capuder **Operator:** Melanie

Date Sent: 5-19-89 **Time Sent:** 9 a.m.

Documents Sent: Rule 123

Comments: FAXED for Chief Justice J. Curtiss Brown

Rule 123. DAMAGES IN ORIGINAL PROCEEDINGS

In an original proceeding in which relief is denied, in any civil cause, action, or proceeding where it is determined that a relator has filed leave to file an original proceeding for delay or without sufficient cause, and which court has granted leave to file the proceeding, then it may award damages against such relator, to each real party in interest, not to exceed twenty times the filing fees relator has paid in connection with the original proceeding.

Rule 123. DAMAGES FOR DELAY IN ORIGINAL PROCEEDINGS

In an original proceeding arising out of or in connection with any civil cause, action, or proceeding where an appellate court shall determine that a relator has filed leave to file an original proceeding in the appellate court for delay or without sufficient cause, and without regard to whether the court has granted leave to file the proceeding, then the appellate court may award, as damages against such relator, to each real party in interest an amount not to exceed twenty times the filing fees relator has paid to the appellate court in connection with the original proceeding.

5/19
[illegible], Scott Sabo
Agenda
[illegible]
Hix.

00326

LAW OFFICES

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May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Hecht

MARY M. CRAFT
MASTER, 314TH DISTRICT COURT
FAMILY LAW CENTER, 4TH FLOOR
1115 CONGRESS
HOUSTON, TEXAS 77002
(713) 221-6475

February 9, 1989

Mr. Thomas S. Morgan
2500 N. Big Spring
Suite 120
Midland, Texas 79705

Dear Tom:

I read your article in the last Juvenile Law Section Newsletter, and I agree that appealing a delinquency case for an indigent client is tricky. However, I have been concerned for some time about the problem of civil appeals for all indigents and offer the following thoughts.

An indigent's appeal in a criminal case differs from that in a civil case in that a criminal appellant is only required to file a written notice of appeal in the trial court within 30 days of the judgment's signing. T.R.App.P. 41(b)(1). The clerk is required to forward a copy of the notice of appeal to the appellate court and the attorney for the state. T.R.App.P. 40(b)(1). A pauper's affidavit requesting a free statement of facts may be filed in the trial court within the same 30-day period. T.R.App.P. 53(j)(2). Apparently the pauper's affidavit is seldom challenged, especially if appellant had appointed trial counsel. This procedure in indigent criminal appeals is substantially different from that in civil indigent appeals.

THE PROCESS IN INDIGENT CIVIL APPEALS

Presently, the procedure for appeal on behalf of an indigent in a civil case is as follows:

1. An affidavit of inability to pay costs (as an alternative to a cost bond) must be filed by appellant with the clerk of the trial court within 30 days after signing of the order which is being appealed. T.R.App.P. 40(a)(3)(A). Appeal is then perfected. T.R.App.P. 41(a)(1).

2. Notice of the filing of appellant's affidavit must be given by appellant to the opposing party or his attorney and to the court reporter of the court in which the case was tried within

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

T.R.A.P. 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal, or ~~that~~ which is of such importance to the jurisprudence of the State, ~~that in the opinion of the Supreme Court, it~~ as to requires correction, the Court will deny the application with the notation ["~~Refused.— No Reversible Error~~"] "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

(b) (No Change).

(c) (No Change).

Change to be effective January 1, 1988.

Already done

1/1/88

463-1340

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 10, 1987

Tony,
Re TRAP 133
Xc TRCP 208
& TRCP 168

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, TX 78205

Re: Tex. R. App. P. 133.

Dear Luke:

The Court has determined that in order to clarify our change in procedure pursuant to S.B. 841, we need to amend Texas Rule of Appellate Procedure 133. It is the desire of the Court to change from "n.r.e." to "writ denied" and include within that category those cases where there is error in the CA judgment but the error is not of such magnitude as to effect the jurisprudence of the State.

I have prepared a suggested rule change by merely adding the language of the statute as shown on the attached copy. Would you run this by whomever you deem necessary and make any suggestions you have and get back to me. We presently plan January 1, 1988 as a requiem date for n.r.e. I believe we can squeeze that one rule into the Bar Journal in time to get the requested notice by January 1, 1988, however, it must be done by next week.

Also, Pat Hazel called regarding Rule 208. In paragraph one, we had included the provision that only with leave of court could depositions be taken prior to answer date of the defendant. In the final form as promulgated that sentence was omitted and for Rule 208(1) we showed "(No Change)." I could not find the reason for the deletion in my notes. Do you recall? Thanks for your help and I await your answer on T.R.A.P. 133.

Put back in.

Sincerely,

James P. Wallace
Justice

00339

cc: Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, TX 75275

Mr. Russell McMains
McMains & Constant
P. O. Drawer 2846
Corpus Christi, TX 78403

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WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas Texas 75275

Re: Tex. R. App. P. 133

Dear Bill:

I have enclosed comments sent to me through Justice Wallace regarding Rule 133. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
Enclosure

RULE 136. Briefs of Respondents and Others.

(a) Time and Place of Filing. (No change)

(b) Form. (No change)

(c) Objections to Jurisdiction. (No change)

(d) Reply and Cross-Points. (No change)

(e) Reliance on Prior Brief. (No change)

(f) Amendments. (No change)

(c) Extensions of Time. An extension of time may be granted for late filing in the Supreme Court of respondent's brief if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing the brief.

TRAP 136

Majority - no change

MICHOL O'CONNOR
P. O. BOX 25337
HOUSTON, TEXAS 77265
(713) 665-3950

August 17, 1987

Luther H. Soules, III
800 Milam Building
San Antonio, Texas 78205

Re: Extensions to time to file respondent's brief and to file a motion for rehearing in the Supreme Court.

Dear Luke,

The Texas Rules of Appellate Procedure do not have any provision for extension of time to file the respondent's brief or to file the motion for rehearing in the Supreme Court. The last time I needed an extension of time to file a motion for rehearing in the Supreme Court, one of the clerks told me that the Court grants the motions even though there is no provision for them. In order to be safe, I filed a skeleton motion for rehearing and then amended it.

I suggest that we amend Rule 136, "Briefs of Respondents and Other," and Rule 190, "Motion for Rehearing," to provide for extensions. I have enclosed drafts of the two proposals.

I appreciated getting copies of the new rules. I needed them for a paper for the appellate program in October. Thanks again.

Yours truly,

Michol O'Connor
MO'C/mb

Enclosure

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SOULES & WALLACE

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A PROFESSIONAL CORPORATION

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WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

April 27, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 15, 136 and 190

Dear Rusty:

Upon review of the SCAC Agenda I was unable to ascertain whether you had been sent copies of the enclosed correspondence from Chief Justice Howard M. Fender and Justice Michol O'Connor. Therefore, I am forwarding same to you at this time. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

00344

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

Rule 182. Judgment on Affirmance or Rendition

(a) (No change)

(b) Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may [~~,—as—part—of—its judgment,~~] award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award [~~,—as—part—of—its—judgment,~~] each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

COMMENT: Justice Kilgarlin raised the question on whether or not the Supreme Court under this rule was required to grant a writ and enter a judgment before being able to assess the sanction authorized by the rule. By deleting the language noted from the rule, the court will have authority to assess sanctions without granting a writ and entering a judgment in the case.

TRAP 182

LAW OFFICES

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TELECOPIER
(512) 224-7073

June 14, 1988

Mr. Rusty McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

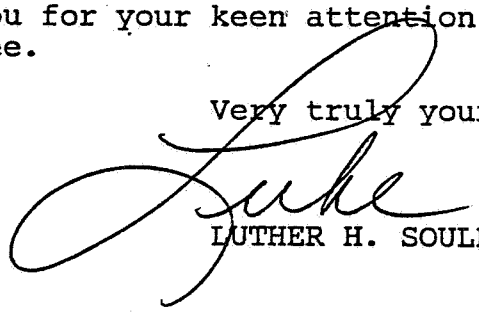
Re: Proposed Changes to Rules of Appellate Procedure

Dear Rusty:

I have enclosed comments sent to me by J. Shelby Sharpe regarding proposed changes to Rule 15a, Rule 121, and Rule 182, Texas Rules of Appellate Procedure. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Joe R. Greenhill

Copy to LHS
Orig to File
6-1-88
hjh

LAW OFFICES OF
J. Shelby Sharpe

2401 TEXAS AMERICAN BANK BUILDING
FORT WORTH, TEXAS 76102
(817) 338-4900
429-2301 METRO

SCAC
Subc -

May 25, 1988

Mr. R. Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Dear Doak:

Enclosed you will find in appropriate form recommended changes to Rule 15a, Rule 121 and Rule 182, Texas Rules of Appellate Procedure, as per the discussion of the Committee on Administration of Justice at its May 7, 1988 meeting. The Committee can take final action on these proposed changes at the June 4, 1988 meeting.

By copy of this letter, I am sending a copy of these to the other members of my subcommittee, Luther Soules and retired Chief Justice Joe R. Greenhill.

Very truly yours,

Shelby

J. Shelby Sharpe

JSS:cf

cc: Professor Jeremy C. Wicker
Chief Justice J. Curtiss Brown
Luther H. Soules
Honorable Joe R. Greenhill

LAW OFFICES

LUTHER H. SOULES III

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(512) 224-7073

May 17, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Proposed Changes to Texas Rule of Appellate Procedure

Dear Rusty:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 4, 5, 40, 51, 84, 90, 182(b), and 130(a). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 2, 1989

Honorable Mary M. Craft, Master
314th District Court
Family Law Center
4th Floor
1115 Congress
Houston, Texas 77002

Dear Master Craft:

Chief Justice Phillips has referred to me, as the Justice having primary responsibility for oversight of the rules, your very insightful letter regarding indigent civil appeals.

I am most grateful for your thoughts and expect they will be carefully considered as we look toward amendments in the rules this year.

I hope if you have additional suggestions you will feel free to let me know.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

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Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

two days after the filing. Without notice the appellant "shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." T.R.App.P. 40(a)(3)(B).

3. Any contest to the affidavit (by a party or court officer) must be filed within 10 days after notice is received. If a contest is filed a hearing is set by the court and notice given by the clerk. T.R.App.P. 40(a)(3)(C). The court must rule against the affidavit by signed order within 10 days of filing of the contest or the affidavit is taken as true. T.R.App.P. 40(a)(3)(E).

THE PROBLEMS

At first glance these rules would appear to facilitate indigent appeals, but the opposite is true. As you point out, many attorneys who practice primarily criminal law, or civil law for paying clients, are not familiar with the procedure and inadvertently lose their right to appeal.

The possibility of losing a right to appeal because of failure to give proper notice is obvious from the cases you mentioned and others. For example, In re V.G., 746 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1988, no writ), followed the Corpus Christi court's decisions in In re R.R. and In re R.H. In V.G. an indigent's appeal from a certification judgment was dismissed because the state's attorney did not receive the two-day notice that a pauper's affidavit had been filed. Reading between the lines in V.G., it is possible the D.A. actually knew of the filing of the pauper's affidavit and chose not to file a contest in the trial court.

You may also have come across the Texas Supreme Court case of Jones v. Stayman, 747 S.W.2d 369 (Tex. 1987), a per curiam mandamus decision which seemed to provide some hope that notice requirements would be construed with flexibility. The trial court in this termination case had neglected to sign an order determining the contest or extending the time within 10 days of filing the contest. The state contended that a letter sent to the court reporter one day after the affidavit of inability was filed stating counsel's intention to request a free statement of facts was inadequate under T.R.App.P. 40(a)(3)(B). The Court stated that the letter, though "not a model of precision" sufficiently fulfilled the purpose of the rule. The Court further noted that 1) the letter was timely mailed, and 2) the court reporter was

present at the hearing and did not object to lack of proper notice.

A recent case from Houston, Wheeler v. Baum, No. 01-88-00919-CV, is presently pending before the Supreme Court. Application for leave to file writ of mandamus was granted on February 2, 1989, docketed as No. C-8194. This is a termination case from the First Court of Appeals in which the trial judge did not sign the order determining the contest within the required 10 days from the date of contest. The court of appeals relied on Bantuelle v. Renfro, 620 S.W.2d 635 (Tex. Civ. App.--Dallas 1981 no writ), and In re V.G., supra, and held that "giving of the 2-day notice to the court reporter is mandatory and absent the notice, the appellant cannot prosecute an appeal without paying costs or giving security. An objection at the hearing is not necessary because if no notice is given, a hearing is not required." Interestingly, the real party in interest, Harris County Children's Protective Services, received its notice and filed a contest, but objected to the lack of notice to the court reporter. No testimony was taken on the merits of the indigency claim of appellant. A similar case is Furr v. Furr, 721 S.W.2d 565 (Tex. App.--Amarillo 1986, no writ).

The absurdity of the court reporter notice requirement is demonstrated by Matlock v. Garza, 725 S.W.2d 527 (Tex. App.--Corpus Christi 1987, no writ), decided by the same court that gave us In re R.R. and In re R.H. In dismissing the appeal because the court reporter did not receive the two-day notice, the court found that handing the court reporter the affidavit to be marked as an exhibit during the hearing on the contest did not constitute personal service, reasoning that the court reporter cannot be expected to read every exhibit so presented. Id. at 529.

An insidious aspect of the indigency appeal procedure is that notice of filing the affidavit must be actually received by the opposing party and the court reporter within two days, or on the next business day following two days, unless it is mailed. In Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ), the court of appeals raised the notice issue on its own motion. It found that the allegations in the affidavit of inability to pay costs should be taken as true because the trial court had sustained the contest, but failed to enter a timely written order. However, in calculating whether appellant had properly used the "mailbox rule," T.R.App.P. 4(b), in delivering its notice to the court

reporter, the court ruled that since the affidavit was filed on Thursday, the last day to serve the reporter was Monday. Appellant mailed the notice on Monday, and it was one day too late. Had it been mailed on Sunday, whether postmarked or not, it would have been valid service. The court construed T.R.App.P. 4(b) to require that depositing a document in the mail one day before the last day of the period for taking action was a "condition precedent" for triggering the extension provided by rule 5(a) for mailed documents. Because notice to the court reporter was untimely the appeal was dismissed, even though no objection was made in the trial court by anyone.

THE FLAWS

The flaws in the procedure for indigents' appeals are obvious.

First, two days is simply too short a time to get notice out. Some Monday and Friday holidays are federal but not state, or county but not federal, etc. Secretaries (and lawyers) neglect to go to the post office on Friday, and wait until Monday to send the mail.

Second, why is notice to the court reporter required at all? The reporter is not a party to the suit, is not an attorney, and does not have the benefit of legal counsel to assist in a contest. In fact, I have not come across any reported case in which a court reporter filed a contest, although this is the stated basis for requiring notice. Jones v. Stayman, supra. Presumably the court reporter, after notice, can contest providing a statement of facts for no additional compensation. Although paid a regular salary, they are required to prepare a free statement of fact in any indigent's civil appeal. T.R.App.P. 53(j). In criminal cases, T.R.App.P. 53(j)(2), and Title 3 indigent appeals, Tex. Fam. C. sec. 56.02(b)(c), the trial judge sets the amount of payment to the court reporter which is paid from the county general fund.

Further, if a non-indigent appellant perfects an appeal, the bond or cash deposit only has to be filed in the statutory amount of $1,000.00, unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. T.R.App.P. 40(a)(1), 46. No notice is required to be given to the court reporter, although it is a rare case indeed when this amount will cover the cost of preparing a

statement of facts.

Third, the appellate courts' treatment of the notice provisions as quasi-jurisdictional, and not subject either to waiver or the harmless error rule, goes against the grain of modern procedure. Absent a showing of harm by the state's attorney or the court reporter, the failure of the appealing indigent to give notice of intent to seek an appeal without posting a cost bond should never result in loss of the appeal. The language of T.R.App.P. 40(a)(3)(B) has been construed far too strictly by ignoring the possibility that lack of notice is either non-waivable or harmless, or that actual knowledge of filing the affidavit is sufficient "notice."

PROPOSED SOLUTIONS

My experience indicates that the majority of attempted indigent appeals are dismissed for lack of jurisdiction because of failure to comply with notice requirements. I agree with your proposal to liberalize the requirements and suggest the following additional proposals for your consideration:

1. Amend T.R.App.P. 40(a)(3)(A) by adding: "The affidavit of inability to pay costs on appeal shall be in the form specified in Rule 145 of the Texas Rules of Civil Procedure."

2. Amend T.R.App.P. 40(a)(3)(B) to provide that the civil notice requirement be the same as the criminal, i.e., that the clerk notify opposing counsel of the filing of the affidavit of inability, and eliminate altogether the requirement of notice to the court reporter.

3. Amend T.R.App.P. 40(a)(3)(B) by deleting the language following the semi-colon ("otherwise . . ..) and substituting the following:

> "Should it appear to the court that notice has not been given under this subsection the court shall direct the clerk to notify opposing counsel and extend the time for hearing an additional ten days after the date of the order of extension."

This would be consistent with the provisions of T.R.App.P. 40(a)(3)(E) and 41(a)(2).

4. Instead of proposing that no bond or affidavit be filed (only notice of appeal be given), amend T.R.App.P. 40(a)(3)(D) and place the burden on the party contesting the affidavit of inability to show appellant is able to pay costs in any case in which an attorney was appointed to represent the appellant in the trial court. (Even a criminal appellant is required to file a pauper's oath and request to waive bond.)

5. Amend T.R.App.P. 40(a)(3)(E) by adding the following:

"Upon proof that the appellant is presently receiving a governmental entitlement based on indigency, the court shall deny the contest. If the court sustains the contest and finds that appellant is able to pay costs, the reasons for such a finding shall be contained in an order. Evidence shall be taken of the estimated cost of preparing a statement of facts and transcript."

6. Amend T.R.App.P. 51, covering the transcript on appeal, by adding a provision requiring the clerk to furnish a free transcript on appeal if the appellant is found unable to pay costs. This should parallel T.R.App.P. 53(j)(1), covering the free statement of facts.

Given the historically irrational nature of attorney/guardian ad litem distinctions, I don't think it's useful to rely on the cases which allow the guardian (but not the attorney) ad litem, who appeals in his representative capacity to do so without filing a cost bond, cash deposit or affidavit in lieu thereof.

I look forward to seeing you in Austin on the 18th. If you think these proposals merit further discussion, I would enjoy getting together with you and anyone else interested in this issue at a mutually convenient time.

Very truly yours,

Mary Craft

MARY MANSFIELD CRAFT

MMC/cm

P.S. Oral argument has been scheduled in Wheeler v. Baum, for March 1, 1989 at 9:00 a.m. in the Texas Supreme Court.

cc: Mr. Robert O. Dawson
University of Texas
School of Law
727 E. 26th St.
Austin, Texas 78705

cc: Texas Supreme Court
Civil Rules Advisory Committee
c/o Hon. Thomas R. Phillips
Supreme Court Building
Austin, Texas 78711

RULE 190. Motions for Rehearing.

(a) Time for Filing. (No change)

(b) Contents and Service. (No change)

(c) Notice of the Motion. (No change)

(d) Answer and Decision. (No change)

(e) Extensions of Time. An extension of time may be granted for late filing in the Supreme Court of a motion motion for rehearing, if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing the motion.

TRAP 90 Amend to Amend

MICHOL O'CONNOR
P. O. BOX 25337
HOUSTON, TEXAS 77265
(713) 665-3950

Agenda

August 17, 1987

Luther H. Soules, III
800 Milam Building
San Antonio, Texas 78205

Re: Extensions to time to file respondent's brief and to file a motion for rehearing in the Supreme Court.

Dear Luke,

The Texas Rules of Appellate Procedure do not have any provision for extension of time to file the respondent's brief or to file the motion for rehearing in the Supreme Court. The last time I needed an extension of time to file a motion for rehearing in the Supreme Court, one of the clerks told me that the Court grants the motions even though there is no provision for them. In order to be safe, I filed a skeleton motion for rehearing and then amended it.

I suggest that we amend Rule 136, "Briefs of Respondents and Other," and Rule 190, "Motion for Rehearing," to provide for extensions. I have enclosed drafts of the two proposals.

I appreciated getting copies of the new rules. I needed them for a paper for the appellate program in October. Thanks again.

Yours truly,

Michol O'Connor
MO'C/mb

Enclosure

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April 27, 1989

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Re: Texas Rule of Appellate Procedure 15, 136 and 190

Dear Rusty:

Upon review of the SCAC Agenda I was unable to ascertain whether you had been sent copies of the enclosed correspondence from Chief Justice Howard M. Fender and Justice Michol O'Connor. Therefore, I am forwarding same to you at this time. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

00361

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September 6, 1988

TO: Subcommittee on Rules 15 through 165

We will have a difficult job in following the outstanding work of Sam Sparks and his subcommittee. As you know, Sam dedicated a tremendous amount of time to the work of this subcommittee and the results showed it.

In any event, we need to begin our work for the coming year. Accordingly, I enclose herewith a copy of the relevant portion of the report of the State Bar of Texas Committee on Administration of Justice for your review. You will note that the committee recommended a change to Rule 107.

I also enclose a copy of a letter from Sarah B. Duncan suggesting a change to Rule 72.

Finally, enclosed is a copy of a letter from Judge Antonio Zardenetta suggesting a proposed change to Rule 145.

I would appreciate receiving your comments on these proposed changes within the next 10 days. I will then attempt to see if we can reach a consensus on a recommendation to the Supreme Court Advisory Committee.

I look forward to working with you.

Very truly yours,

David J. Beck

DJB/st

Enclosures

cc: Justice William W. Kilgarlin
Luther H. Soules, III, Esq.
Sam Sparks, Esq.

5929B

00362

STATE BAR OF TEXAS

June 13, 1988

Honorable William W. Kilgarlin
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Mr. Luther H. Soules, III
Chairman, SC Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Dear Justice Kilgarlin and Luke:

During the 1987-88 year, the Committee on the Administration of Justice considered a number of proposed rules changes and a complete report of the actions taken by the Committee for recommendation to the Supreme Court Advisory Committee is attached.

If you have any questions about these actions, please let me know.

It has been a pleasure to serve as Chairman of this Committee for the past year and I greatly appreciate the assistance both of you have given to the Committee. I will look forward to serving as a member of the Committee for the next two years.

Respectfully,

R. Doak Bishop

RDB;eaa
Enclosures

00363

ACTIONS TAKEN BY THE

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

1. Committee voted to recommend amendments to the following Rules: (The finally adopted version of each Rule with appropriate comments is attached)

Rule 107	Return of Citation
Rule 166b	Forms and Scope of Discovery; Protective Orders; Supplementation of Responses
Rule 167	Discovery and Production of Documents and Things for Inspection, Copying or Photographing
Rule 168	Interrogatories to Parties
Rule 169	Requests for Admission
Rule 208	Depositions Upon Written Questions
Rule 245	Assignment of Cases for Trial
Rule 269	Argument
TRAP Rule 15a	Grounds for disqualification and Recusal of Appellate Judges
TRAP Rule 121	Mandamus, Prohibition and Injunction in Civil Cases
TRAP Rule 182	Judgment on Affirmance or Rendition
Rule 687	Requisites of Writ

2. Committee voted to recommend that no change be made in the following Rules: (Comments are attached)

Rule 38(c)	Third Party Practice
Rule 51(b)	Joinder of Claims and Remedies
Rule 62	Amendment Defined
Rule 63	Amendments
Rule 103	Who May Serve
Rule 206	Certification by Officer; Exhibits; Copies; Notice of Delivery
Rule 239a	Notice of Default Judgment
Rule 279	Submission of Issues
Rule 680	Temporary Restraining Orders
Rule 771	Objections to Report

Unpublished Opinions

3. Committee voted to recommend elimination of the following Rule: (Comment attached)

Rule 260	In Case of New Counties

4. The following Rules were deferred until the 1988-89 year as a more complete study of the Notice Rules is being undertaken by Judge Don Dean:

Rule 21a	Notice
Rule 72	Filing Pleadings; Copy Delivered to all Parties or Attorneys
Rule 120a	Special Appearance

5. Local Rules - Following discussion of the model local rules, the Committee ADOPTED a MOTION by Judge Curtiss Brown that the draft presented by Professor Bill Dorsaneo constituted the approach the Committee wished to take with regard to the local rules.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 107. RETURN OF ~~CITATION~~ SERVICE

The return of the officer or authorized person ... if he can ascertain. NO CHANGE.

Where citation is executed by an alternative ... by the court. NO CHANGE.

No default judgment shall be granted in any cause until the citation, or process under Rule 108 or 108a, with proof of service as provided by this rule or by Rule 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

COMMENT: The above amendment to Rule 107 is designed to clearly provide that a default judgment can be obtained where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a.

107 as amended

PROPOSED RULE CHANGE
Adopted by the
COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follow: No change

   a. In General. No change

   b. Documents and Tangible Things. No change

   c. Land. No change

   d. Potential Parties and Witnesses. No change

   e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows: No change

   (1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

   (2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models,

compilation of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when ~~it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness~~ the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

(3) Determination of Status. No change

(4) Reduction of Report to Tangible Form. No change

f. Indemnity, Insuring and Settlement Agreements. No change

g. Statements. No change

h. Medical Records: Medical Authorization. No change

3. Exemptions: The following matters are protected from disclosure by privilege:

a. Work Product. No change

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tengible things containing such information if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

c. Witness Statements. No change

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable communications,~~ Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the

claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. No change

4. Presentation of Objections. No change

5. Protective Orders. No change

6. Duty to Supplement. No change

COMMENT: To eliminate the contradiction between Rule 166b 2.e(1) and (2) and corresponding Rule 166b 3.b, the three areas have been modified to make discoverable the impressions and opinions of a consulting expert if a testifying expert had reviewed these opinions and material, regardless of whether or not the opinions and material formed a basis for the opinion of a testifying expert.

With regard to Rule 166b 3.d, there has been some confusion over the meaning of the phrase "and other discoverable communications" as published by West Publishing Company in its current Texas Rules of Civil Procedure handbook. To eliminate this confusion, the rule was been redrafted and deletes the confusing phrase. As modified, the intent of the rule with regard to communications between employees of a party is now clear. To further improve upon the language of the rule, it is suggested that the provision with regard to experts be separately stated at the end of the Rule.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 167. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

1. Procedure. No change

2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. Objections served after the date on which a response is to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

3. Custody of Originals by Parties. No change

4. Order. No change

5. Nonparties. No change

COMMENT: The purpose of the modification of Rule 167(2) is to provide for a waiver of objections provision so that Rule 167 and Rule 168 conform. Absent such a revision, it is unclear whether objections are waived under Rule 167, if not served on or before the date a response is to be served. The modification, as suggested, will not permit objections to be served after the date on which a response is to be served without agreement, order of the court or good cause. The amendment follows the similar provision of Rule 168.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon the party. No change

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court. No change

A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.

2. Scope. No change
3. Procedure. No change
4. Time to Answer. No change
5. Number of Interrogatories. No change
6. Objections. No change

COMMENT: Prior to the 1988 amendments to the Texas Rules of Civil Procedure, Rule 168 provided for the filing of interrogatories or answers with the clerk of the court. The 1988 amendment deleted that part of Rule 168 and accordingly, no longer imposed a filing requirement. The suggested modication will therefore not change the existing rule but merely clarify the intent of the amendment and expressly prohibit the filing of interrogatories or answers with the clerk of the court without court order. Also, the suggested modification of Rule 168 will conform this rule to the similar provision contained in Rule 167 with regard to the filing of interrogatories or answers with the clerk of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 169. Requests for Admission

1. Request for Admission. At anytime after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it. No change

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, or as otherwise agreed to by the parties, the party to whom the request is directed serves upon the party requesting the admission, a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. No request shall be deemed admitted unless the request contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within

the time allowed by this rule and stated in the request. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the ansering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An ansering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. No change

COMMENT: The change in Rule 169 is designed to provide notice to recipients of requests for admissions that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness a poublic or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these tules.

2. Notice by Publication. No change

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. No change
4. Deposition Officer; Interpreter. No change
5. Officer to take Responses and Prepare Record. No change

COMMENT: Rule 208 is silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 will conform to Rule 200 and permit the deposition on written questions of dedendant prior to appearance date with permission of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

Unless otherwise provided, the court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five ten days to the parties, or by agreement of the parties. Provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. No ncontested cases may be trial or disposed of at any time whether set or not, and may be set at any time for any other time.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 269. Argument

(a) No changge

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but ~~by~~ should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant ground.

(h) No change

COMMENT: This change was made simply to correct a typographical error.

Rule 15a. Grounds For Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court is evenly divided the motion to recuse shall be denied.

COMMENT: The present rule does not contain a provision dealing with an en banc evenly divided court on a motion to recuse. The proposed amendment will deal with that situation without the necessity of bringing in a visiting judge to break the tie. The bringing in of another judge would cause unnecessary difficulties and delays and potential embarrassment.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Texas Rules of Appellate Procedure

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) No change

(2) Petition. The petition shall include this information and be in this form:

(A) No change

(B) If any judge, court, tribunal or other person or intity ~~respondent~~ in the discharge of duties of a public character is required by law to be made a party, ~~named as respondent,~~ the petition shall disclose the names of the parties to the cause below and the real parties ~~party~~ in interest, if any, ~~or the party~~ whose interests would be directed affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal or other person or entity acting in the discharge of duties of a public character, name as relator or respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the matter. The body of the motion or petition shall state the name and address of each relator and respondent, including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of the duties of a public character.

COMMENT: The proposed amendment eliminates a misleading impression created by the existing rule. Under the current version of subdivision (a)(2)(B) the judge or the court involved is named as respondent. This creates the erroneous impression in the minds of the public that the judge or court is being sued in the traditional sense. An even more serious problem arises where a trial judge files a petition for mandamus against a court of appeals in the Supreme Court to seek "review" of the respondent's previously rendered order granting a litigant's petition for mandamus filed in the respondent court. As Judge Michael Schattman so aptly stated: "This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations."

The proposed amendment requires the caption to name as petitioner the parties to the cause below adversely affected by the court's action complained of, instead of the actual petitioning judge, if any, and the name of the respondent to be that of the parties to the cause below favored by such action, instead of the actual respondent judge or court. In situations where there is no party to the cause below aligned with the actual petitioner or respondent who is a public official or entity, such as where no law suit is pending and the petition is directed to an executive officer or some agency official, that officer or official would be the named respondent in the caption as well as disclosed in the body of the petition as the actual respondent.

An example of a real party in interest as defined in the proposed amendment is a child who is the subject of a motion to modify child support and the managing conservator has filed a petition for mandamus to compel the trial judge to transfer the cause to the county of the child's residence. The child's name and address must be disclosed in the petition. The managing conservator is the actual petitioner and the petitioner named in the caption. The trial judge is the actual respondent, but the possessory conservator is named as respondent in the caption because he is the party to the cause below who was favored by the trial court's action, i.e., the denial of the motion to transfer.

Rule 182. Judgment on Affirmance or Rendition

(a) (No change)

(b) Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may [~~,—as—part—of—its judgment,~~] award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award [~~,—as—part—of—its—judgment,~~] each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

COMMENT: Justice Kilgarlin raised the question on whether or not the Supreme Court under this rule was required to grant a writ and enter a judgment before being able to assess the action authorized by the rule. By deleting the language noted from the rule, the court will have authority to assess sanctions without granting a writ and entering a judgment in the case.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed fourteen ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

PROPOSED RULES CHANGES

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee that NO CHANGE be made in the following Rules:

Rule 38(c) and Rule 51(b) - The subcommittee felt that if the language regarding direct actions is eliminated from the Rules, it might give the impression that a cause of action of that nature now exists. Since the Supreme Court Advisory Committee is considering "Direct Actions", the subcommittee recommended that no change be made by COAJ at this time.

Rule 62 and Rule 63 - These Rules deal with amendments to pleadings and a question was raised as to whether the filing of a counterclaim is considered to be an amended pleading. Prof. Dorsaneo said a counterclaim is not considered to be separate from the answer and is a pleading. A straw vote by held and the Committee voted to make no change in the Rules.

Rule 103 - Royce Coleman, an attorney from Denton, had requested a change in this Rule, which deals with the officer who may serve, which would allow the present procedure set out in the Rule or for service by any private individual. The Rule was amended January 1, 1988 to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court. It was the Committee's consensus that the 1988 amendment took care of the problem.

Rule 206 - George Pletcher of Houston expressed his concern about Rule 206 with reference to the original of a deposition being delivered to the attorney or party who asked the first question and thereafter, "upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit." The subcommittee felt the Rule should be left as it is insofar as the oblication of the custodial attorney to permit any party to review the deposition. If copying is to be done, it must be done by the reporter who made the transcript. Committee voted no change.

Rule 239a - Attorney Ralph Kinsey of Lamesa had suggested that it would be helpful if the clerk in compliance with Rule 239a would send a copy of the notice to the plaintiff or attorney and file a copy of the notice in the file of the case. The subcommittee agreed unanimously that there was no immediate reason to change Rule 239a at this time.

Rule 279 - New language added to the Rule on January 1, 1988 stated that a claim that the evidence was legally or factually insufficient to warrant the submission of any questions made be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant. Several people had objected to the new language because "factual insufficiency" is never a valid complaint to the submission of any issue but only to the answer. An amendment was offered that the last sentence of the Rule be amended to read: A claim

that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant." A MOTION to TABLE the proposed amendment was ADOPTED by a vote of 8 to 4.

Rule 680 - Judge John Marshall of Dallas had requested that this Rule be modified to cause the writ, since it is effective only upon service, to be returnable on the Friday next after the expiration of two days, excluding the date of service. Mr. Baggett, chairman of the subcommittee, talked with Judge Marshall about the Rule and recommended that no change be made.

Rule 771 - Emerson Stone of Jacksonville stated that this Rule does not provide a time limit within which a party must act to file his objections. The subcommittee considered the request but voted to make no change in the Rule.

Unpublished Opinions - Some members of the Court felt that the Supreme Court should promulgate a rule authorizing the current practice of ordering an unpublished court of appeals' opinion to be published in appropriate circumstances and had asked COAJ to look at the matter. Judge Brown stated that he felt the Court of Appeals needed to control these matters as opposed to the Supreme Court. If the Supreme Court wants to have an opinion published it has the power to enter an order. The Committee voted to make no change at this time.

copy to LHS
Orig to file
8-12-88 LJ

Minton, Burton, Foster & Collins

Attorneys at Law, A Professional Corporation. 1100 Guadalupe, Austin, Texas 78701. (512) 476-4873

SCAC Subc
+ Agenda

August 8, 1988

Mr. Luther H. Soules III
Chairman, Supreme Court
Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205

Dear Mr. Soules:

In reviewing the 1988 amendments to the Texas Rules of Civil Procedure, I noticed that Rule 72 (copy enclosed) now requires that a copy of a pleading, plea, or motion be delivered only to "the adverse party," rather than to "all parties." With all due respect, I suggest that this amendment be reconsidered.

Even if a party is not an "adverse party" with respect to a particular pleading, plea, or motion, that party's interest may nonetheless be affected by the pleading, plea, or motion or by any disposition thereon. Under amended Rule 72, however, that party would not even receive notice of the filing of the pleading, plea, or motion or of any hearing or disposition thereon.

For instance, suppose one of several derivative plaintiffs fails to answer interrogatories propounded by one of several defendants, and a motion for sanctions is filed. Suppose further that the nonoffending plaintiffs rely upon the filing of the offending plaintiff's initial pleading in support of their assertion that the statute of limitations has not run on the plaintiffs' derivative claims. Under amended Rule 72, it would appear the court could, without notice to the nonoffending plaintiffs, strike the offending plaintiff's pleadings as sanctions for her abuse of the discovery process, thereby depriving the nonoffending plaintiffs of a defense to the defendants' plea of limitations. The nonoffending plaintiffs would have been effectively deprived of the opportunity to oppose the motion for sanctions, which so vitally affects their interests because they were not "adverse parties" as to that particular motion. Similarly, the other defendants, which would clearly have an interest in supporting the motion for sanctions, would have no notice of its filing or of any hearing thereon.

A similar situation is presented by the filing of a motion for leave to file a third-party claim. Although the plaintiff may not be an "adverse party" as to that particular motion, her interests may nonetheless be affected if the joinder of an additional party delays trial of the case, increases the amount of necessary discovery, etc. Despite the obvious potential for affecting the plaintiff's interests, Rule 72 would not require delivery of a copy of the motion to the plaintiff.

Since the rule already limits the number of copies required to be delivered in instances in which there are more than four parties entitled to receive a copy of the pleading, plea, or motion, the additional copying and mailing costs imposed by requiring delivery to "all parties" would not appear sufficiently substantial to justify the 1988 amendment to Rule 72.

Thank you for your attention to this matter.

Sincerely,

Sarah B. Duncan

Sarah B. Duncan
For the Firm

Rule 71. Misnomer of Pleading

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. [Pleadings shall be docketed as originally designated and shall remain identified as designated, unless the court orders redesignation. Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.]

Rule 72. Filing Pleadings; Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to ~~all parties~~ [the adverse party] or ~~his~~ [their] attorney(s) of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

Comment: The amendment restores the rule to the pre-1984 version in that it now requires service only on the adverse party.

Rule 87. Determination of Motion to Transfer

1. Consideration of Motion. (No Change).

2. Burden of Establishing Venue.

(a) In General. A party who seeks to maintain venue of the action in a particular county in reliance upon ~~Section 1~~ [Section

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

August 17, 1988

HJH
SCAC Subcommittee
TRCP 14
& TRAP
Agenda at Both.
Z

Hon. Antonio A. Zardenetta
111th Judicial District
Laredo, Texas 78040

Dear Judge Zardenetta:

I am in receipt of your letter of May 19, 1988 regarding the proposed changes to the Rules of Civil Procedure, and I appreciate your taking the time to write.

I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

Antonio A. Zardenetta
DISTRICT JUDGE
111TH JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40, Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

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(512) 224-7073

August 10, 1987

TO ALL SUBCOMMITTEE CHAIRPERSONS:

Enclosed is a letter from Mr. F. John Wagner, Jr., requesting that the alphabetical and numerical designations of the Rules of Civil Procedure be conformed. Please have your subcommittee review the rules within your purview to ascertain whether such changes are necessary and prepare a report to be given at our next scheduled meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace
Mr. F. John Wagner, Jr.

MICHAEL C. AINBINDER
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WILEY N. ANDERSON III
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AREA CODE 713
961-4103
FACSIMILE NO
713/961-4147

July 21, 1987

Mr. Luther H. Soules, III
Law Office of Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Re: Alphanumerical designation of the Texas Rules of Civil Procedure

Dear Mr. Soules:

I received information from the Texas State Bar that you are the Chairman of the Advisory Committee to the Supreme Court. I am not certain if your Committee is the proper one to receive this recommendation; if it is not, I would appreciate it if you would place it before the proper committee or agency. I am recommending that, prior to January 1, 1988, the Supreme Court uniformally subdivide the Texas Rules of Civil Procedure throughout.

As you probably know, a substantial amendment to the Rules takes effect on January 1, 1988. In reviewing these amendments I noticed that Rule 166-A will become Rule 166a, in keeping with other alphanumeric designations throughout the Rules. However, when you look at the subparts of what will be Rule 166a, you will see that the first division thereunder has a small alpha designation within parenthesis; i.e. (a), (b), etc. But when you examine Rule 166b as it presently exists, you see that the first division is followed by a simple numerical, the second division by a simple small alpha, the third division by a parenthetical numerical and so forth; i.e., 2.e.(1). This kind of helter-skelter alphanumeric designation exists throughout the Rules. For instance, see Rule 113, where the first division is a parenthesized small alpha, while Rule 167 has unparenthesized numericals and alphas as its division.

It seems, that with the amendment of the Rules coming up shortly, now would be an ideal time to standardize the manner by which the Rules are subdivided. It is much easier to cite a subdivided rule if all divisions begin with a parenthetical, such as is the system in the Federal Rules of Civil Procedure. I.e., Federal Rule of Civil Procedure 12(h)(1) is much less susceptible to citation error as would be Texas Rule of Civil Procedure 167.1.b.

I hope this suggestion proves to have some merit for the State Bar, and I believe its implementation would assist those of use who use the Rules in our daily practice. Thank you for your attention to this matter.

Very truly yours,

WALSH, SQUIRES & TOMPKINS

By: _____
F. John Wagner, Jr.

FJW/ga
(LTR7)

cc: Mr. James H. Leeland
Walsh, Squires & Tompkins

STATE BAR OF TEXAS

Copy to LHS
Orig to File

June 13, 1988

Honorable William W. Kilgarlin
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Mr. Luther H. Soules, III
Chairman, SC Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Dear Justice Kilgarlin and Luke:

During the 1987-88 year, the Committee on the Administration of Justice considered a number of proposed rules changes and a complete report of the actions taken by the Committee for recommendation to the Supreme Court Advisory Committee is attached.

If you have any questions about these actions, please let me know.

It has been a pleasure to serve as Chairman of this Committee for the past year and I greatly appreciate the assistance both of you have given to the Committee. I will look forward to serving as a member of the Committee for the next two years.

Respectfully,

R. Doak Bishop

RDB;eaa
Enclosures

Please transmit to SCAC Sub Cs + Agenda.

00395

ACTIONS TAKEN BY THE

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

1. Committee voted to recommend amendments to the following Rules: (The finally adopted version of each Rule with appropriate comments is attached)

Rule 107	Return of Citation
Rule 166b	Forms and Scope of Discovery; Protective Orders; Supplementation of Responses
Rule 167	Discovery and Production of Documents and Things for Inspection, Copying or Photographing
Rule 168	Interrogatories to Parties
Rule 169	Requests for Admission
Rule 208	Depositions Upon Written Questions
Rule 245	Assignment of Cases for Trial
Rule 269	Argument
TRAP Rule 15a	Grounds for disqualification and Recusal of Appellate Judges
TRAP Rule 121	Mandamus, Prohibition and Injunction in Civil Cases
TRAP Rule 182	Judgment on Affirmance or Rendition
Rule 687	Requisites of Writ

2. Committee voted to recommend that no change be made in the following Rules: (Comments are attached)

Rule 38(c)	Third Party Practice
Rule 51(b)	Joinder of Claims and Remedies
Rule 62	Amendment Defined
Rule 63	Amendments
Rule 103	Who May Serve
Rule 206	Certification by Officer; Exhibits; Copies; Notice of Delivery
Rule 239a	Notice of Default Judgment
Rule 279	Submission of Issues
Rule 680	Temporary Restraining Orders
Rule 771	Objections to Report
Unpublished Opinions	

3. Committee voted to recommend elimination of the following Rule: (Comment attached)

Rule 260	In Case of New Counties

4. The following Rules were deferred until the 1988-89 year as a more complete study of the Notice Rules is being undertaken by Judge Don Dean:

Rule 21a	Notice
Rule 72	Filing Pleadings; Copy Delivered to all Parties or Attorneys
Rule 120a	Special Appearance

5. Local Rules - Following discussion of the model local rules, the Committee ADOPTED a MOTION by Judge Curtiss Brown that the draft presented by Professor Bill Dorsaneo constituted the approach the Committee wished to take with regard to the local rules.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 107. RETURN OF ~~CITATION~~ SERVICE

The return of the officer or authorized person ... if he can ascertain. NO CHANGE.

Where citation is executed by an alternative ... by the court. NO CHANGE.

No default judgment shall be granted in any cause until the citation, or process under Rule 108 or 108a, with proof of service as provided by this rule or by Rule 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

COMMENT: The above amendment to Rule 107 is designed to clearly provide that a default judgment can be obtained where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a.

PROPOSED RULE CHANGE
Adopted by the
COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follow: No change

   a. In General. No change

   b. Documents and Tangible Things. No change

   c. Land. No change

   d. Potential Parties and Witnesses. No change

   e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows: No change

   (1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness <u>or if the consulting expert's opinions or impressions have been reviewed by a testifying expert</u>.

   (2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models,

compilation of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when ~~it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness~~ the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

(3) Determination of Status. No change

(4) Reduction of Report to Tangible Form. No change

f. Indemnity, Insuring and Settlement Agreements. No change

g. Statements. No change

h. Medical Records: Medical Authorization. No change

3. Exemptions: The following matters are protected from disclosure by privilege:

a. Work Product. No change

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tengible things containing such information if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

c. Witness Statements. No change

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable communications,~~ Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the

claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. No change

4. Presentation of Objections. No change

5. Protective Orders. No change

6. Duty to Supplement. No change

COMMENT: To eliminate the contradiction between Rule 166b 2.e(1) and (2) and corresponding Rule 166b 3.b, the three areas have been modified to make discoverable the impressions and opinions of a consulting expert if a testifying expert had reviewed these opinions and material, regardless of whether or not the opinions and material formed a basis for the opinion of a testifying expert.

With regard to Rule 166b 3.d, there has been some confusion over the meaning of the phrase "and other discoverable communications" as published by West Publishing Company in its current Texas Rules of Civil Procedure handbook. To eliminate this confusion, the rule was been redrafted and deletes the confusing phrase. As modified, the intent of the rule with regard to communications between employees of a party is now clear. To further improve upon the language of the rule, it is suggested that the provision with regard to experts be separately stated at the end of the Rule.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 167. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

1. Procedure. No change

2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. Objections served after the date on which a response is to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

3. Custody of Originals by Parties. No change

4. Order. No change

5. Nonparties. No change

COMMENT: The purpose of the modification of Rule 167(2) is to provide for a waiver of objections provision so that Rule 167 and Rule 168 conform. Absent such a revision, it is unclear whether objections are waived under Rule 167, if not served on or before the date a response is to be served. The modification, as suggested, will not permit objections to be served after the date on which a response is to be served without agreement, order of the court or good cause. The amendment follows the similar provision of Rule 168.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon the party. No change

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court. No change

A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.

2. Scope. No change
3. Procedure. No change
4. Time to Answer. No change
5. Number of Interrogatories. No change
6. Objections. No change

COMMENT: Prior to the 1988 amendments to the Texas Rules of Civil Procedure, Rule 168 provided for the filing of interrogatories or answers with the clerk of the court. The 1988 amendment deleted that part of Rule 168 and accordingly, no longer imposed a filing requirement. The suggested modication will therefore not change the existing rule but merely clarify the intent of the amendment and expressly prohibit the filing of interrogatories or answers with the clerk of the court without court order. Also, the suggested modification of Rule 168 will conform this rule to the similar provision contained in Rule 167 with regard to the filing of interrogatories or answers with the clerk of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 169. Requests for Admission

1. Request for Admission. At anytime after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it. No change

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, or as otherwise agreed to by the parties, the party to whom the request is directed serves upon the party requesting the admission, a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. No request shall be deemed admitted unless the request contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within

the time allowed by this rule and stated in the request. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the ansering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An ansering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. No change

COMMENT: The change in Rule 169 is designed to provide notice to recipients of requests for admissions that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness a poublic or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these tules.

2. Notice by Publication. No change

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. No change

4. Deposition Officer; Interpreter. No change

5. Officer to take Responses and Prepare Record. No change

COMMENT: Rule 208 is silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 will conform to Rule 200 and permit the deposition on written questions of dedendant prior to appearance date with permission of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

Unless otherwise provided, the court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five ~~ten~~ days to the parties, or by agreement of the parties. Provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. No ncontested cases may be trial or disposed of at any time whether set or not, and may be set at any time for any other time.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 269. Argument

(a) No changge

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but ~~by~~ should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant ground.

(h) No change

COMMENT: This change was made simply to correct a typographical error.

Rule 15a. Grounds For Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court is evenly divided the motion to recuse shall be denied.

COMMENT: The present rule does not contain a provision dealing with an en banc evenly divided court on a motion to recuse. The proposed amendment will deal with that situation without the necessity of bringing in a visiting judge to break the tie. The bringing in of another judge would cause unnecessary difficulties and delays and potential embarrassment.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Texas Rules of Appellate Procedure

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) No change

(2) Petition. The petition shall include this information and be in this form:

(A) No change

(B) If any judge, court, tribunal or other person or intity ~~respondent~~ in the discharge of duties of a public character is required by law to be made a party, ~~named as respondent,~~ the petition shall disclose the names of the parties to the cause below and the real parties ~~party~~ in interest, if any, ~~or the party~~ whose interests would be directed affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal or other person or entity acting in the discharge of duties of a public character, name as relator or respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the matter. The body of the motion or petition shall state the name and address of each relator and respondent, including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of the duties of a public character.

COMMENT: The proposed amendment eliminates a misleading impression created by the existing rule. Under the current version of subdivision (a)(2)(B) the judge or the court involved is named as respondent. This creates the erroneous impression in the minds of the public that the judge or court is being sued in the traditional sense. An even more serious problem arises where a trial judge files a petition for mandamus against a court of appeals in the Supreme Court to seek "review" of the respondent's previously rendered order granting a litigant's petition for mandamus filed in the respondent court. As Judge Michael Schattman so aptly stated: "This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations."

The proposed amendment requires the caption to name as petitioner the parties to the cause below adversely affected by the court's action complained of, instead of the actual petitioning judge, if any, and the name of the respondent to be that of the parties to the cause below favored by such action, instead of the actual respondent judge or court. In situations where there is no party to the cause below aligned with the actual petitioner or respondent who is a public official or entity, such as where no law suit is pending and the petition is directed to an executive officer or some agency official, that officer or official would be the named respondent in the caption as well as disclosed in the body of the petition as the actual respondent.

An example of a real party in interest as defined in the proposed amendment is a child who is the subject of a motion to modify child support and the managing conservator has filed a petition for mandamus to compel the trial judge to transfer the cause to the county of the child's residence. The child's name and address must be disclosed in the petition. The managing conservator is the actual petitioner and the petitioner named in the caption. The trial judge is the actual respondent, but the possessory conservator is named as respondent in the caption because he is the party to the cause below who was favored by the trial court's action, i.e., the denial of the motion to transfer.

00412

Rule 182. Judgment on Affirmance or Rendition

(a) (No change)

(b) Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may [~~,—as—part—of—its judgment,~~] award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award [~~,—as—part—of—its—judgment,~~] each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

COMMENT: Justice Kilgarlin raised the question on whether or not the Supreme Court under this rule was required to grant a writ and enter a judgment before being able to assess the sanction authorized by the rule. By deleting the language noted from the rule, the court will have authority to assess sanctions without granting a writ and entering a judgment in the case.

00413

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed <u>fourteen</u> ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

PROPOSED RULES CHANGES

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee that NO CHANGE be made in the following Rules:

Rule 38(c) and Rule 51(b) - The subcommittee felt that if the language regarding direct actions is eliminated from the Rules, it might give the impression that a cause of action of that nature now exists. Since the Supreme Court Advisory Committee is considering "Direct Actions", the subcommittee recommended that no change be made by COAJ at this time.

Rule 62 and Rule 63 - These Rules deal with amendments to pleadings and a question was raised as to whether the filing of a counterclaim is considered to be an amended pleading. Prof. Dorsaneo said a counterclaim is not considered to be separate from the answer and is a pleading. A straw vote by held and the Committee voted to make no change in the Rules.

Rule 103 - Royce Coleman, an attorney from Denton, had requested a change in this Rule, which deals with the officer who may serve, which would allow the present procedure set out in the Rule or for service by any private individual. The Rule was amended January 1, 1988 to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court. It was the Committee's consensus that the 1988 amendment took care of the problem.

Rule 206 - George Pletcher of Houston expressed his concern about Rule 206 with reference to the original of a deposition being delivered to the attorney or party who asked the first question and thereafter, "upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit." The subcommittee felt the Rule should be left as it is insofar as the oblication of the custodial attorney to permit any party to review the deposition. If copying is to be done, it must be done by the reporter who made the transcript. Committee voted no change.

Rule 239a - Attorney Ralph Kinsey of Lamesa had suggested that it would be helpful if the clerk in compliance with Rule 239a would send a copy of the notice to the plaintiff or attorney and file a copy of the notice in the file of the case. The subcommittee agreed unanimously that there was no immediate reason to change Rule 239a at this time.

Rule 279 - New language added to the Rule on January 1, 1988 stated that a claim that the evidence was legally or factually insufficient to warrant the submission of any questions made be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant. Several people had objected to the new language because "factual insufficiency" is never a valid complaint to the submission of any issue but only to the answer. An amendment was offered that the last sentence of the Rule be amended to read: A claim

that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant." A MOTION to TABLE the proposed amendment was ADOPTED by a vote of 8 to 4.

Rule 680 - Judge John Marshall of Dallas had requested that this Rule be modified to cause the writ, since it is effective only upon service, to be returnable on the Friday next after the expiration of two days, excluding the date of service. Mr. Baggett, chairman of the subcommittee, talked with Judge Marshall about the Rule and recommended that no change be made.

Rule 771 - Emerson Stone of Jacksonville stated that this Rule does not provide a time limit within which a party must act to file his objections. The subcommittee considered the request but voted to make no change in the Rule.

Unpublished Opinions - Some members of the Court felt that the Supreme Court should promulgate a rule authorizing the current practice of ordering an unpublished court of appeals' opinion to be published in appropriate circumstances and had asked COAJ to look at the matter. Judge Brown stated that he felt the Court of Appeals needed to control these matters as opposed to the Supreme Court. If the Supreme Court wants to have an opinion published it has the power to enter an order. The Committee voted to make no change at this time.

PROPOSAL

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee elimination of Rule 260 from the Texas Rules of Civil Procedure:

Rule 260. In Case of New Counties - Judge Charles Bleil of Texarkana pointed out the Rule appeared to be obsolete. He said in looking through annotations, he found that only one case had been cited on this Rule and this was in 1891 and that case held that the Rule did not apply. The subcommittee recommended that the Rule be eliminated and the recommendation was ADOPTED.

Rule 3a. Rules by Other Courts

Each court of appeals, administra district court, county court, county cou court, may make and amend local rules gov such courts, provided;

(1) No change.

(2) ~~Any~~ time or time period provide ~~enlarged, but not reduced, by~~ local rules, ~~or oth~~

~~(2)~~ (3) any proposed local rule or amen effective until it is submitted and approv of Texas; and

~~(3)~~ (4) any proposed local rule or amen effective until at least thirty (30) days in a manner reasonably calculated to bring attorneys practicing before the court or made; and

~~(4)~~ (5) all local rules and amendments adopted and approved in accordance herewith are made available upon request to the members of the bar.

(6) No local rule, order, or practice of any court shall ever be applied so as to determine the merits of any matter, ~~unless the rule complies fully with all requirements of this Rule 3a.~~

Comment: To make Texas Rules of Civil Procedure time tables ~~dominant~~ mandatory except for local rule enlargement of times; and to preclude use of unpublished local rules for determining issues of substantive merit.

Adopted 1 Aug

00418

Rule 3a. Rules by Other Courts

Each court of appeals, administrative judicial region, district court, county court, county court at law, and probate court, may make and amend ~~the~~ rules governing practice before such courts, provided;

(1) No change.

(2) ~~Any time or~~ time period provided by these rules may be ~~enlarged, but not reduced,~~ by rules ~~of other courts~~; and

~~(2)~~ (3) any proposed rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas; and

~~(3)~~ (4) any proposed rule or amendment shall not become effective until at least thirty (30) days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made; and

~~(4)~~ (5) all rules adopted and approved in accordance herewith are made available upon request to the members of the bar.

(6) No rule, or practice of any ~~other~~ court shall ever be applied so as to determine the merits of any matter ~~unless the rule complies fully with all requirements of this Rule 3a~~.

Comment: To make Texas Rules of Civil Procedure time tables ~~dominant except for local rule enlargement of times~~; and to preclude use of unpublished local rules ~~for~~ determining issues of substantive merit.

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April 17, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 3a

Dear Mr. Branson:

Enclosed please find a redlined version of rule 3a. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
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PROPOSED CHANGE TO RULE 3a
SUGGESTED BY JUDGE ANN T. COCHRAN

It is suggested that a concluding sentence be added to Rule 3a as follows:

"All local rules of all courts must conform to this rule and local rules or practices that exist otherwise at any time shall not be exercised so as to determine merits of any matter before any court."

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August 18, 1988

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 3a

Dear Mr. Branson:

I have enclosed a copy of a recommended change that has been suggested by Judge Ann T. Cochran regarding Rule 3a. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

PROPOSED RULE CHANGE

RULE 5. ENLARGEMENT.

When by these rules or by a notice given thereunder or by order of court an act is require
at or within a specified time, the
may, at any time in its discretic
motion or notice, order the period
therefor is made before the exp
originally prescribed or as extende
or (b) upon motion permit the act
expiration of the specified perioc
shown for the failure to act. [~~, but~~
enlarge the period for taking any
relating to new trials except as sta
~~provided, however, if a motion for n~~

If any document is sent to the
class United States mail in an envel
addressed and stamped and is deposit
or ~~more~~ before the last day for filing same, the same, if received by the clerk no more than ten days tardily, shall be filed by the clerk and be deemed filed in time. [~~, provided, however, that a~~] A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

Mun. adopted

REASONS FOR THE CHANGE

Most lawyers believe they can file documents with the trial court by mailing them to the clerk one day before they

PROPOSED RULE CHANGE

RULE 5. ENLARGEMENT.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. [~~, but it~~] The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules. [~~, provided, however, if a motion for new trial~~]

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~one day~~ on or ~~more~~ before the last day for filing same, the same, if received by the clerk no more than ten days tardily, shall be filed by the clerk and be deemed filed in time. [~~, provided, however, that a~~] A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

REASONS FOR THE CHANGE

Most lawyers believe they can file documents with the trial court by mailing them to the clerk one day before they

are due. That is not the case. Under Rule 5(a), Tex.R.Civ.P., as it is presently written, the only document a party can mail to the clerk one day before it is due is the motion for new trial. If the motion for new trial is sent by mail, it is be considered timely filed if:

a. it is mailed one day in advance, and
b. it is sent by first-class, U.S. mail, and
c. it reaches the court within 10 days after it is due.

There is no uniformity in the rules about the last day a document can be mailed.

Rule 21a, Tex.R.Civ.P., permits a party to mail documents to opposing counsel on the same day they are due. The rule says the document is served at the time it is mailed.

The appellate rules further complicate the matter. Rule 4(b), Tex.R.App.P., says any document relating to taking an appeal shall be deemed timely filed if it is "deposited in the mail one day or more before the last day" for taking the required action, that is, the day before it is due. Rule 5(a), Tex.R.App.P., however, provides:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

It is hard to understand Rule 5(a) alone, much less when it is read with Rule 4(b). Together, they seem to say:

> 1. If the last day is a working day, a party may mail the document to the clerk on that day. Tex.R.App.P. 5(a).
>
> 2. If the last day is a holiday or weekend, a party must mail the document to the clerk the day before the last day. Tex.R.App.P. 4(b).

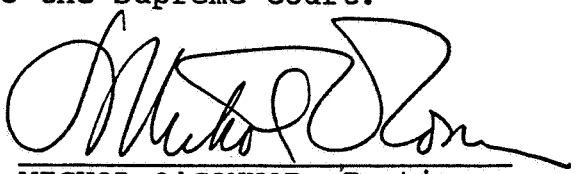
The courts are not in agreement when a document must be put in the mail to comply with Rules 4(b) and 5(a), Tex.R.App.P. For example: If document is due to be filed on a Saturday, and therefore it is actually due the next Monday, under some court's interpretation of Rule 4 and 5, the party must mail it to the court no later than Sunday. **Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel**, 749 S.W.2d 186, 187 (Tex.App.--Dallas 1988), **Walkup v. Thompson**, 704 S.W.2d 938 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.), and **Martin Hedrick Co. v. Gotcher**, 656 S.W.2d 509 (Tex.App.--Waco 1983, writ ref'd n.r.e.) Contra: **Ector County I.S.D. v. Hopkins**, 518 S.W.2d 576 (Tex.App.--El Paso 1975, no writ.)

To further illustrate the confusion, the appeal bond, which is governed by Rule 40, Tex.R.App.P., and is generally considered an appellate document, must be filed with the trial court pursuant to the rules for computing time of the rules of civil procedure, not the rules of appellate procedure. Under Rules 5 of the rules civil procedure, the appellant may not file the document by mailing it to the clerk one day before it is due. Appellant must make sure it reaches the clerk by the last day it is due.

I think the Court should change Rule 5, Tex.R.Civ.P., to permit all documents to be filed by mailing the day before due. Or, if the Court prefers, Rules 4 and 5, Tex.R.Civ.P., and Rules 4 and 5, Tex.R.App.P., could be amended to permit all documents to be considered filed on the date mailed.

We need uniform rules to permit filing by mail.

Please contact me if this suggestion is placed on the docket of the Advisory Committee to the Supreme Court.



MICHOL O'CONNOR, Justice
First Court of Appeals
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10th Floor
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(713) 655-2700

00425

Copy to LHS
Orig to file
2/6 dgh

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

2/8
HJH
SCAC SUPC - R 5 & 21a
TRAP
Agenda (both)
xc Justice Cornyn

February 3, 1989

Mr. Luther Soules, III
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Here is a proposed rule change I meant to discuss with you today.

Also - Evans said yes about speaking on A.D.R.

Thx

Michol

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February 9, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 5

Dear Mr. Branson:

Enclosed please find a copy of a letter forwarded to me by Judge Michol O'Connor regarding changes to Rule 5, Texas Rules of Civil Procedure. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Michol O'Connor

00427

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May 17, 1989

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
2178 Plaza of the Americas
North Tower, LB 310
Dallas, Texas 75201

Re: Proposed Change to Rule 13

Dear Mr. Branson:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding changes to Rules 13. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanton Pemberton

00428

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

Rules

MEMO

March 15, 1989

TO: J. Hecht
FROM: J. Mauzy

I am attaching a copy of a letter I received today from Tim Kelley of Dallas regarding a suggested amendment in the Rules. Since this falls in the jurisdiction of the Advisory Committee on Rules, which you chair, I wanted to pass it on to you for such distribution as you deem advisable.

TIMOTHY E. KELLEY
A PROFESSIONAL CORPORATION
Attorneys at Law
6200 LBJ FREEWAY, SUITE 240
DALLAS, TEXAS 75240-6305
(214) 661-5150

TIMOTHY E. KELLEY
BOARD CERTIFIED
CIVIL TRIAL LAW AND
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

GREGORY S. DAVIS

March 7, 1989

Justice Oscar H. Mauzy
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Re: Disclosure of Witnesses

Dear Justice Mauzy:

In several recent cases it has become quit
many Defendants are deliberately withhol
witnesses, both lay and expert, until 30
puts an unnecessary burden upon the other s
you are faced with the prospect of having t
depositions during the last 30 days in
defense of the case is going to be.

The rules are quite clear in my mind to
witnesses should be disclosed as soon as th
Waiting until 30 days before trial, in my
this rule.

I wonder if there is any way that the
eliminate this abuse. Since most of the
practices this, giving discretion to the trial court may not be of much benefit particularly in larger metropolitan areas. Perhaps, a slight revision of Rule 13 might be helpful in promoting attorneys to disclose the names of their witnesses as soon as they become available.

Yours very truly,

Timothy E. Kelley

TIMOTHY E. KELLEY

TEK:mc

00432

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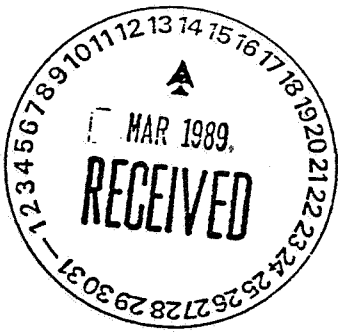
GREGORY S. DAVIS



March 7, 1989

Justice Oscar H. Mauzy
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Re: Disclosure of Witnesses

Dear Justice Mauzy:

In several recent cases it has become quite clear to me that a great many Defendants are deliberately withholding the names of important witnesses, both lay and expert, until 30 days prior to trial. This puts an unnecessary burden upon the other side because all of a sudden you are faced with the prospect of having to take five or six different depositions during the last 30 days in order to find out what the defense of the case is going to be.

The rules are quite clear in my mind to provide that the names of witnesses should be disclosed as soon as they are known and available. Waiting until 30 days before trial, in my opinion, is a clear abuse of this rule.

I wonder if there is any way that the rule could be amended to eliminate this abuse. Since most of the time it is the defense who practices this, giving discretion to the trial court may not be of much benefit particularly in larger metropolitan areas. Perhaps, a slight revision of Rule 13 might be helpful in promoting attorneys to disclose the names of their witnesses as soon as they become available.

Yours very truly,

Timothy E. Kelley

TIMOTHY E. KELLEY

TEK:mc

Judges - F41.
Raul Gonzalez

Clint W. Lewis and Associates
ATTORNEYS AT LAW

Delaware Office Plaza - Suite 2
3560 Delaware
Beaumont, Texas 77706
(409) 899-5600
Telecopier (409) 899-5682

CLINT W. LEWIS
MARC P. HENRY

December 30, 1988

Rules

Justice Raul A. Gonzalez
Post Office Box 161777
Austin, Texas 78716-1777

Dear Justice Gonzalez:

I am not certain whether it is appropriate to write to a Supreme Court Justice concerning a matter of public and legal policy. However, since you have written directly to me, I would like to express something on my own behalf and on behalf of other trial lawyers with whom I have discussed civil sanctions.

I personally believe that civil sanctions as made available under Federal Rule 12 and Texas Rule 13, have gotten way out of hand. Trial judges are now given the authority to dispose of cases and punish lawyers in a way that I do not believe was ever intended. While it is true that the Texas and the federal court systems needed a method for preventing discovery abuses and possibly to prevent the interposition of frivolous pleadings and motions, the sanctions process has been distorted and is being misused by trial judges. I believe that a trial attorney owes it to his client to plead each and every possible theory of recovery which may net his client relief (by the way, I am a defense attorney), short of pleading outright falsehoods.

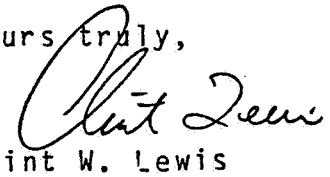
I believe that sanctions should be reserved for those cases in which an attorney or a party has clearly and undeniably perpetrated a fraud upon the court. Judges are being given the unbridled power to make decisions which have been historically left to juries and it is having a chilling effect on the practice as it relates to pleading for relief for plaintiffs and innovative defense strategies and tactics. Novelty, imagination and courage are what have brought us to the advanced state of civilization and justice we enjoy today. For an attorney's imagination to be stifled for fear that he may be hit with staggering sanctions because an ill-mannered judge does not agree with his theory, hurts all of us in the long run. These things are actually happening in Texas courts, both state and federal, at this time. I am constantly hearing from other attorneys who have experienced some major setback due to the sanction powers which have been placed in the hands of trial judges who have fairly run amok with the thrill of this almost unbridled power. Some may say that there is an adequate remedy for improper sanctions awards but you

must remember that it is expensive for attorneys to defend themselves from sanctions and courts of appeal are, for the most part, reluctant to find that a district judge downstairs in the same building is guilty of an abuse of judicial discretion.

Other trial lawyers have said, and I concur, that we should return to a system whereby trial lawyers are encouraged to be innovative and sometimes venture out on the cutting edge of the art of trial advocacy. The rules should be changed to provide that sanctions can only be awarded against an attorney who refuses to comply with a valid court order and against an attorney who has deliberately and willfully filed a pleading or interposed a motion or objection which was known to be fraudulent when filed. That is not to say that I am in favor of doing away with the trial court's power to award attorney's fees to a successful party in a motion proceeding. However, those attorney's fees should be limited to those attorney's fees which can actually be calculated based upon the time spent by the prevailing attorney and should not be awarded beyond such a calculation in such a way as to punish the unsuccessful litigator.

I appreciate your time and attention to this letter and wish you every good fortune in continuing your exemplary judicial career.

Yours truly,



Clint W. Lewis

CWL/plt

No change

TRCP Rule 18b. Grounds for Disqualification and Recusal of **Judges**

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:

(a) (No change.)

(b) (No change.)

(c) either of the parties [or their attorney's] may be related to them by affinity or consanguinity within the third degree.

(2) (No Change)

Under Model

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SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Re: Rule 18b Tex. R. Civ. P.

Dear Sam:

I have enclosed comments sent to me through Dan Sullivan regarding Rule 18b. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
enclosure

SHS
info. copy

Law Offices
Dan Sullivan
119 Northwest Ave. A
Andrews, Texas 79714-6391
—
915 - 523-4145

Tina,
Refer to SCAC Subc & Rgmdas.

August 11, 1987

Mr. Luther H. Soules, III
Attorney at Law
800 Milam Bldg.
San Antonio, Texas 78205

Re: Rule 18b Texas Rules of Civil Procedure

Dear Luther:

You will recall that we spoke on the telephone regarding the proposed rule changes to be adopted by the Supreme Court effective January 1, 1988.

We have a serious problem in Andrews County regarding the District Judge's son practicing in his father's court. Most of the lawyers in the area feel that this is improper primarily for the reason that it causes a breakdown of faith and confidence in the judicial system, especially in those situations where a client's adversary is being represented by the Judge's son in a matter before the court.

Rule 18b (c) provides that a Judge shall disqualify himself if either of the parties may be related to him by affinity or consaguinity within the third degree.

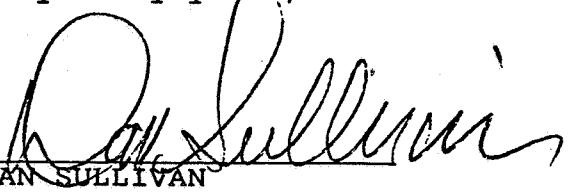
I feel that if it is improper for a party to be related then it should also be improper for any party to be represented by an attorney who is related to the Judge within the third degree.

Would it be possible for Rule 18b (c) to be modified to read as follows:

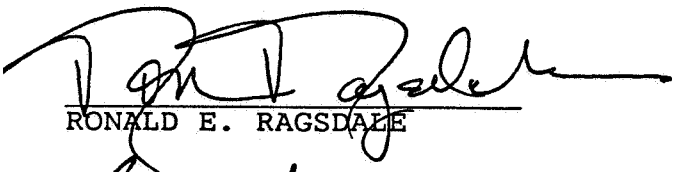
> ...(c) either of the parties or their attorney's may be related to them by affinity or consaguinity within the third degree.

Of course, we would like to have this Rule adopted and to take effect by January 1, 1988 if possible, but if that is impossible, we would like to have the rule changed as soon as it can be done.

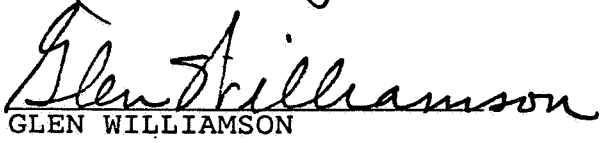
Very truly yours,



DAN SULLIVAN



RONALD E. RAGSDALE



GLEN WILLIAMSON

TRCP

Rule 21. Motions

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, [shall be served on all parties,] and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon [all other] ~~the adverse party~~ [parties], not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

COMMENT: Copy technology has significantly changed since 1941 and this amendment brings approved copy service practice more current.

LAW OFFICES

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September 16, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rules 21, 21a, 72 and 73

Dear Mr. Beck:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 21, 21a, 72 and 73. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

60440

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule: Rule 21. Motions

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon the adverse party not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording

An application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be made in writing, shall state the grounds therefor, shall set forth the relief or order sought, shall be served on all parties, and shall be filed and noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other ~~the adverse party~~ parties, not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

R 21

0044

Evan Approved

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Copy technology has significantly changed since 1941 and this amendment brings approved copy service practice more current.

Respectfully submitted,

Robert F. Watson
LAW, SNAKARD & GAMBILL
3200 Texas American Bank Bldg.
Fort Worth, Texas 76102

January 16, 1989

LAW OFFICES

SOULES & WALLACE

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GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21, 21(a), 72 and 73

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Evelyn A. Avent, Secretary for the Committee on Administration of Justice regarding changes to Rules 21, 21(a), 72 and 73. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

00443

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

STATE BAR OF TEXAS

HJR 1 Subc
SCRC
+ Agenda

Copy to LHS
Orig. to file
1-27-89
Chjh

January 23, 1989

To the Committee on Administration of Justice

From Evelyn A. Avent, Secretary

Enclosed are proposed changes in final form to Rules 21, 21a, 72 and 73 submitted by Robert F. Watson.

Also enclosed are proposed changes in final form to Rules 223 and 245 submitted by Charles Tighe.

These items will be on the Agenda for action at the March 11 meeting.

Evelyn A. Avent

Enclosures

00444

Rules 21, 21a, 72 &

LAW OFFICES OF
LAW, SNAKARD & GAMBILL
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3200 TEXAS AMERICAN BANK BUILDING
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

AREA 817 335-7373
METRO 429-2991
TELECOPY 332-7473
DIRECT DIAL NUMBER:

(817) 878-6374

January 16, 1989

Ms. Evelyn A. Avent
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Dear Evelyn:

Enclosed are copies of the proposed changes to Rules 21, 21a, 72 and 73. You will notice two versions of Rule 21a are enclosed. One provides for service by first class mail. The other does not. As I indicated at our recent meeting, our sub-committee has no particular feelings either way on the issue of first class mail, and welcomes the consideration of the entire committee of this issue.

After a more thorough review of the language of the proposed rules as amended and the language of existing Rule 8, it appears that any reference to the "attorney in charge" concept of Rule 8 would be redundant inasmuch as the last paragraph of the rule states "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge." This would appear to leave no latitude on the part of anyone attempting to comply with the methodology set forth in proposed Rules 21a and 72, when delivering a copy to a party's "attorney of record" to address it to anyone other than the "attorney in charge" as mandated by Rule 8. I would be very grateful if you would send copies of the proposed rules to all members of the committee so that they may be considered at our meeting on March 11th.

Sincerely,

Robert F. Watson

RFW/ran#5
L.RULES

TRCP

Rule 21a. Notice

Every notice required by these rules [to the Court for an order,] other than t upon the filing of a cause of action expressly provided in these rules, may b copy [thereof] ~~of/the/notice/of/of/the/c the/case/may/be,~~ to the party to be serv duly authorized agent or ~~his~~ attorney of or by [or by agent or by courier re certified or] registered mail, to [the address, [or by telephonic document t current telecopier number,] or it may manner as the court in its discretion mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or telephonic document transfer, three days shall be added to the prescribed period. ~~It~~ [Notice] may be served by a party to the suit, ~~of/his~~ [an] attorney of record, ~~of/by/the/proper~~ [a] sheriff or constable, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed pleading.] A ~~written/statement~~ certificate by [a party or]

C:\DW4\SCAC\044.DOC\HJH

TRCP

Rule 21a. Notice

Every notice required by these rules, [and every application to the Court for an order,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] of the notice of the filing of the cause of action to the party to be served, or his [the party's] duly authorized agent or his attorney of record, either in person or by [or by agent or by courier receipted delivery or by certified or] registered mail, to [the party's] his last known address, [or by telephonic document transfer to the party's current telecopier number,] or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or telephonic document transfer, three days shall be added to the prescribed period. It [Notice] may be served by a party to the suit, of his [an] attorney of record, by the sheriff or constable, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed pleading.] A written statement certificate by [a party or]

an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. *When these rules provide for service by registered mail, such notice or service may also be had by certified mail.*

COMMENT: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved delivery practices more current.

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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rules 21, 21a, 72 and 73

Dear Mr. Beck:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 21, 21a, 72 and 73. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

LAW OFFICES

LUTHER H. SOULES III

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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 21a, 103 and 120(a)
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 21a, and 103. Also enclosed please find a copy of a letter from Robert F. Watson regarding Rule 120(a). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton
Mr. Robert F. Watson

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

March 1, 1989

Mr. John Cochran
Cochran Professional Corporation
P. O. Box 141104
Dallas, Texas 75214

Dear John:

Your letter recommending an expansion of Texas Rule of Civil Procedure 21a has been referred to me, as I have principal responsibility for overseeing the rules.

I am aware of a project ongoing in Harris County to experiment with direct electronic filing of pleadings and papers with the courts. That project is in its early stages, but it has some promise. I am hopeful that other jurisdictions will continue to look into this mechanism for sending information.

I share your desire to move into the twenty-first century by taking advantage of the technology readily available. I just hope we manage to drag the legal system all the way into the twentieth century before it's over with!

Thank you for your comments. Best wishes.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

8-1 Hr on tape -
Here to Rules
File

COCHRAN PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

5838 LIVE OAK
MAILING ADDRESS
POST OFFICE BOX 141104
DALLAS, TEXAS 75214

(214) 828-4444

TELEX: 203941 ACTD-UR

February 23, 1989

Supreme Court
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Rule 21a Revision

Gentlemen:

In my opinion Rule 21a should be expanded to permit delivery of notice by telecopier providing written confirmation of transmission.

I have attached for the committee's review the sort of confirmations which are printed by our Xerox 7020 following a transmission.

With the widespread use of telecopiers, and the drastic reduction in price of units, this machine will become as much a part of the law office as the telephone and the photocopier.

I believe the Texas Bar can move the practice of law into the 21st century by recognizing delivery of notice via this relatively new medium communication.

Yours truly,

John Cochran

Enclosure

9249A/sb

COCHRAN PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
8828 LIVE OAK
MAILING ADDRESS
POST OFFICE BOX 141104
DALLAS, TEXAS 75214
(214) 828-0000
TELEX: 000000 ACTS-UR

XEROX 7020 TRANSMITTAL

DATE: 2-20 89 NUMBER OF PAGES: 3 Includes cover sheet

DELIVER TO: David S Tarkey Department
Name

COMPANY: S G B

FAX NUMBER: 504-774-8708

SUBJECT: Peter Barton response.

COMMENTS: Please Call upon Receipt.

SENDER: John C Cochran

Cochran & Cochran
Post Office Box 141104
Dallas, Texas 75214

FAX NUMBER: 1-214-828-2FAX

If you do not receive all pages sent, please call Verna at 214/828-4444 as soon as possible.

Client Number: 06 Matter Number

Operator: Accounting:

9056A

TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE)
COULD NOT BE SENT

** COUNT **
# 0

00454

*** SEND ***

NO	REMOTE STATION I. D.	START TIME	DURATION	#PAGES	COMMENT
1	15047748708	2-20-89 4:59PM	0'50"	0	OP66/ OK
		TOTAL	0:00'50"	0	

Wrong

XEROX TELECOPIER 7020

COCHRAN PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5535 LIVE OAK
MAILING ADDRESS
POST OFFICE BOX [illegible]
DALLAS, TEXAS 75214
(214) 828-4444
TELEX: 203804 ACTS-UR

XEROX 7020 TRANSMITTAL

DATE: 2-1-89 NUMBER OF PAGES: 6 Includes cover sheet

DELIVER TO: Jim O'Leary Esq. Name Department

COMPANY: SHAFER - DAVIS

FAX NUMBER: 915-333-5002

SUBJECT: INTERR. RESPONSES

COMMENTS: Rec'd Requests 1/30/89 - Had them Rev'd - will work on 2/2 & 2/3

SENDER:

Cochran & Cochran
Post Office Box 141104
Dallas, Texas 75214

FAX NUMBER: 1-214-828-2FAX

If you do not receive all pages sent, please call at 214/828-4444 as soon as possible.

Client Number: 06 Matter Number 5078

Operator: Accounting:

9056A

TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE) WAS SENT

** COUNT **
# 1

*** SEND ***

NO	REMOTE STATION I. D.	START TIME	DURATION	#PAGES	COMMENT
1	19153335002	2- 1-89 7:20PM	1'07"	1	
		TOTAL	0:01'07"	1	

XEROX TELECOPIER 7020

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SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

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REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

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AUSTIN
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SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 9, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21(a), and 106(b)

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Judge Michol O'Connor regarding changes to Rule 21(a) and a copy of a letter from Professor Dorsaneo regarding changes to Rule 106(b). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Michol O'Connor

00456

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Copy to LHS
Orig to file
2/6 Mich

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

2/8
HJH
SCAC SidPC R 5 & 21a
TRAP
Agenda (both)
xc Justice Clamon

February 3, 1989

Mr. Luther Soules, III
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Here is a proposed rule change I meant to discuss with you today.

Also - Evans said yes about speaking on A.D.R.

Thx

Michol

00457

PROPOSED RULE CHANGE

RULE 5. ENLARGEMENT.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause si shown for the failure to act. [~~,-but-it~~] The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules. [~~, provided,-however,-if-a-motion-for-new-trial~~]

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk no more than ten days tardily, shall be filed by the clerk and be deemed filed in time. [~~, provided,-however,-that-a~~] A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

REASONS FOR THE CHANGE

Most lawyers believe they can file documents with the trial court by mailing them to the clerk one day before they

are due. That is not the case. Under Rule 5(a), Tex.R.Civ.P., as it is presently written, the only document a party can mail to the clerk one day before it is due is the motion for new trial. If the motion for new trial is sent by mail, it is be considered timely filed if:

a. it is mailed one day in advance, and
b. it is sent by first-class, U.S. mail, and
c. it reaches the court within 10 days after it is due.

There is no uniformity in the rules about the last day a document can be mailed.

Rule 21a, Tex.R.Civ.P., permits a party to mail documents to opposing counsel on the same day they are due. The rule says the document is served at the time it is mailed.

The appellate rules further complicate the matter. Rule 4(b), Tex.R.App.P., says any document relating to taking an appeal shall be deemed timely filed if it is "deposited in the mail one day or more before the last day" for taking the required action, that is, the day before it is due. Rule 5(a), Tex.R.App.P., however, provides:

> When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.

It is hard to understand Rule 5(a) alone, much less when it is read with Rule 4(b). Together, they seem to say:

1. If the last day is a working day, a party may mail the document to the clerk on that day. Tex.R.App.P. 5(a).

2. If the last day is a holiday or weekend, a party must mail the document to the clerk the day before the last day. Tex.R.App.P. 4(b).

00459

The courts are not in agreement when a document must be put in the mail to comply with Rules 4(b) and 5(a), Tex.R.App.P. For example: If document is due to be filed on a Saturday, and therefore it is actually due the next Monday, under some court's interpretation of Rule 4 and 5, the party must mail it to the court no later than Sunday. **Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel**, 749 S.W.2d 186, 187 (Tex.App.--Dallas 1988), **Walkup v. Thompson**, 704 S.W.2d 938 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.), and **Martin Hedrick Co. v. Gotcher**, 656 S.W.2d 509 (Tex.App.--Waco 1983, writ ref'd n.r.e.) Contra: **Ector County I.S.D. v. Hopkins**, 518 S.W.2d 576 (Tex.App.--El Paso 1975, no writ.)

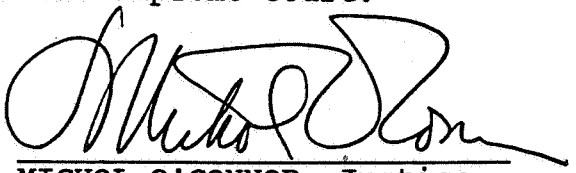
To further illustrate the confusion, the appeal bond, which is governed by Rule 40, Tex.R.App.P., and is generally considered an appellate document, must be filed with the trial court pursuant to the rules for computing time of the rules of civil procedure, not the rules of appellate procedure. Under Rules 5 of the rules civil procedure, the appellant may not file the document by mailing it to the clerk one day before it is due. Appellant must make sure it reaches the clerk by the last day it is due.

I think the Court should change Rule 5, Tex.R.Civ.P., to permit all documents to be filed by mailing the day before due. Or, if the Court prefers, Rules 4 and 5, Tex.R.Civ.P., and Rules 4 and 5, Tex.R.App.P., could be amended to permit all documents to be considered filed on the date mailed.

We need uniform rules to permit filing by mail.

00460

Please contact me if this suggestion is placed on the docket of the Advisory Committee to the Supreme Court.



MICHOL O'CONNOR, Justice
First Court of Appeals
1307 San Jacinto Street
10th Floor
Houston, Texas 77002
(713) 655-2700

00461

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule: Rule 21a. Notice

Every notice required by these rules, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent, or his attorney of record, either in person or by registered mail to his last known address, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other

(continued on attached page)

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Every notice required by these rules, and every application to the Court for an order, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy thereof ~~of the notice or of the document to be served, as the case may be~~ to the party to be served, or ~~his~~ the party's duly authorized agent or ~~his~~ attorney of record, either in person or by agent or by courier receipted delivery or by first class mail to the party's ~~his~~ last known address, or by telephonic document transfer to the party's current telecopier number, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. ~~It~~ Notice may be served by a party to the suit, ~~or his~~ an attorney of record, ~~or by the proper~~ a sheriff or constable, or by any other person competent to testify.

(continued on attached page)

I. relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.

II. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed pleading. A ~~written statement~~ certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. When these rules provide for notice or service by ~~registered mail,~~ first class mail, such notice or service may also be had by registered mail or certified mail.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Delivery means and technologies have significantly changed since 1941 and this amendment brings approved delivery practices more current.

Respectfully submitted,

Robert F. Watson
LAW, SNAKARD & GAMBILL
3200 Texas American Bank Bldg.
Fort Worth, Texas 76102

January 16, 1989

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

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SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21, 21(a), 72 and 73

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Evelyn A. Avent, Secretary for the Committee on Administration of Justice regarding changes to Rules 21, 21(a), 72 and 73. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

0046

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

Rules 21, 21a, 72 &;

LAW OFFICES OF
LAW, SNAKARD & GAMBILL
A PROFESSIONAL CORPORATION
3200 TEXAS AMERICAN BANK BUILDING
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

AREA 817 335-7373
METRO 429-2991
TELECOPY 332-7473
DIRECT DIAL NUMBER:

(817) 878-6374

January 16, 1989

Ms. Evelyn A. Avent
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Dear Evelyn:

Enclosed are copies of the proposed changes to Rules 21, 21a, 72 and 73. You will notice two versions of Rule 21a are enclosed. One provides for service by first class mail. The other does not. As I indicated at our recent meeting, our sub-committee has no particular feelings either way on the issue of first class mail, and welcomes the consideration of the entire committee of this issue.

After a more thorough review of the language of the proposed rules as amended and the language of existing Rule 8, it appears that any reference to the "attorney in charge" concept of Rule 8 would be redundant inasmuch as the last paragraph of the rule states "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge." This would appear to leave no latitude on the part of anyone attempting to comply with the methodology set forth in proposed Rules 21a and 72, when delivering a copy to a party's "attorney of record" to address it to anyone other than the "attorney in charge" as mandated by Rule 8. I would be very grateful if you would send copies of the proposed rules to all members of the committee so that they may be considered at our meeting on March 11th.

Sincerely,

Bob

Robert F. Watson

RFW/ran#5
L.RULES

00466

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

Texas Rules of Civil Procedure

Rule 21a. Notice

Every notice required by these rules [or pleading subsequent to the original complaint], other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent, or his attorney of record, either in person or by ~~registered~~ [first-class] mail to his last known address, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not

received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. ~~When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.~~

21a

LAW OFFICES

SOULES, REED & BUTTS

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LUTHER H. SOULES III
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(512) 224-9144

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(512) 224-7073

Agenda

June 8, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Proposed Changes to Rules 21a and 72
Texas Rules of Civil Procedure

Dear Sam:

Enclosed is a letter from Don L. Baker suggesting changes to Rules 21a and 72.

In the interest of time, I have drafted up proposed rules and am enclosing them, along with a copy of Federal Rule 5, to which Mr. Baker references.

Please look these over and, if you are unable to get a written report to me, be prepared to give an oral report at our June meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Sam,
I do not believe
this is advised.

00472

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

EDITORIAL NOTES

Effective Date of 1983 Amendment. Amendment by Pub.L. 97–462 effective 45 days after Jan. 12, 1983, see section 4 of Pub.L. 97–462, set out as an Effective Date of 1963 Amendment note under section 2071 of this title.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). Compare 2 Minn. Stat. (1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164 and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat. Ann. (Remington, 1932) §§ 244–249.

Note to Subdivision (d). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

1963 AMENDMENT

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22–A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

June 4, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Tx 78705

Re: Tex. R. Civ. P. 21a and 72

Dear Luke and Pat:

I am enclosing a letter from Mr. Don L. Baker, suggesting a change to Tex. R. Civ. P. 21a and 72.

Will you please place these matters on your Agenda for the next meeting so that they might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Don L. Baker
Law Offices of Baker & Price
812 San Antonio, Suite 400
Austin, Tx 78701-2223

Law Offices of Baker & Price A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512-476-6005

May 19, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Austin, TX 78711

Re: Texas Rules of Civil Procedure 21a and 72

Dear Justice Wallace:

There appears to be a hiatus in the application of these two Rules relating to service of pleadings and notices. It's been my observation that for several years, the actual practice has varied significantly from place to place, from lawyer to lawyer, from case to case, and from the actual language of the Rules. Most of the time, it has not been a practical problem, but there have been some recent rulings in local trial courts which have brought the problem into focus.

The specific language of Rule 72 deals with pleadings, pleas and motions, but does not specifically address, deal with or define a "notice". Rule 72 authorizes service by mail, but does not specify whether the mail is to be first class or not, certified or not, registered or not.

Rule 21a specifically deals with "notice", the subject matter of the Rule being defined in the first phrase as "Every notice required by these Rules, . . .". Rule 21a does not appear to control pleadings, motions and pleas. Rule 21a provides for mail to be either by certified or registered mail, thus by implication precluding the first class mail. The Rule, however, does allow service in any other manner as the trial court may direct in its discretion, which presumably would clearly include first class mail.

For many years, it has been a widespread custom to send copies of pleadings to other parties and counsel in a case by first class mail. This is because first class mail is much less expensive, much less troublesome to the sender, much less troublesome to the receiver, and normally makes for better actual notice than the restricted delivery mail. However, it now appears that it is being argued locally that if a notice of setting for hearing on a

Law Offices of Baker & Price A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512-476-6003

motion or pleading is included in the same document, then it is required to be sent by certified mail. Strangely enough, since Rule 21a does not apply to pleadings and there does not appear to be any other rule which expressly requires sending of a notice of a setting, it appears logically arguable that Rule 21a doesn't apply to anything. If there is a rule which says that a party must give notice to all other parties of each setting for hearing on a motion, I have not found that rule. Of course, we have done that for years, as have other attorneys.

In order to make the rules fit together logically, it would be my suggestion that appropriate language be used to amend these rules to provide that it is the responsibility of the moving party or the party filing any document with the court to send a copy to all other parties or their attorney of record. I suggest that the requirement also be expressly made that notice of any hearing or setting obtained or requested by any party similarly be sent.

Further, I suggest that the standard method of sending be by first class mail without the requirement of certified or registered mail unless the court shall order otherwise in a given case. The reasons for suggesting that first class mail is a better method include:

1. Actual receipt and actual knowledge of the contents are much more likely with first class mail than with certified mail because first class mail is delivered whether anyone chooses to sign for it or not. Actual knowledge is more likely by first class mail because there are many people who still believe the untrue folk wisdom that if you don't sign for the certified mail, then you are not on notice of and not bound by the contents of it. This means there are lots of folks who simply fail or refuse to sign for certified or registered mail.

2. Notice and knowledge will be received more quickly because there is no need to make a separate subsequent trip to the post office to obtain mail and sign for it since first class mail will be left at the address intended. It is increasingly the case that both spouses are employed outside the home and where notice is sent to a residential address, it is a large burden on people to take off work during the hours of the day when the post office is open and go to the post office to claim and sign for receiptable mail.

Rule 26. Clerk's Court Docket

Each clerk shall also keep a court docket in a ~~well bound~~ ~~book~~ [permanent record] ~~in which he~~ shall ~~enter~~ include the number of the case and the names of parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

R 26

Was approved

00478

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

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(512) 224-7073

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JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 11, 1989

Mr. David J. Beck
Fulbright & Jaworski
800 Bank of Southwest Building
Houston, Texas 77002

Re: Texas Rule of Civil Procedure 26

Dear Mr. Beck:

Enclosed is a suggestion for change received from Bexar County District Clerk David Garcia together with a series of documents that show the numerous places in which the District Clerk must now keep permanent records. The "well bound book" concept of Rule 26, he suggests, is out-voted by modern recordkeeping. I tend to agree, but would like to have your committee's input in that connection. Apparently, particularly in larger counties where computers are essential, the "well bound book" is multiplicative (not merely duplicative) of records already otherwise kept, and require many hours of manpower passing documents and orders from data processing to courtroom clerks and back for handwritten entries. Would not the requirement of a "permanent record" in the rules be adequate?

I would appreciate your preparing to report on this suggested change in our upcoming May 26-27, 1989 meeting at the Texas Bar Center in Austin.

Very truly yours,

Luther H. Soules III

LHSIII:gc
C:/DW4/MISC/GARCIA.doc

cc: Justice Nathan Hecht
District Clerk David Garcia

00479

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

was filed and the time of filing, and sign his name officially thereto.

Source: Art. 1972.

Rule 25. Clerk's File Docket

Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.

Source: Art. 1973.

Rule 26. Clerk's Court Docket

Each clerk shall also keep a court docket in a ~~well-bound book~~ permanent record in which he shall enter the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

Source: Texas Rule 79 (for District and County Courts), with minor textual change.

Rule 27. Order of Cases

The cases shall be placed on the docket as they are filed.

Source: Texas Rule 80 (for District and County Courts).

SECTION 3. PARTIES TO SUITS

Rule 28. Suits in Assumed Name

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

(Amended by order of July 21, 1970, eff. Jan. 1, 1971.)

Source: Part of Federal Rule 17(b).

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1971: Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

Rule 29. Suit On Claim Against Dissolved Corporation

When no receiver has been appointed for a corporation which has dissolved, suit may be instituted on any claim against said corporation as though the same had not been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved, and judgment may be rendered as though the corporation had not been dissolved.

Source: Art. 1391.

Rule 30. Parties To Suits

Assignors, endorsers and other parties not primarily liable upon any instruments named in the chapter of the Business and Commerce Code, dealing with commercial paper, may be jointly sued with their principal obligors, or may be sued alone in the cases provided for by statute.

(Amended by order of July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 572.

Rule 31. Surety Not To Be Sued Alone

No surety shall be sued unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in cases otherwise provided for in the law and these rules.

Source: Art. 6251.

Rule 32. May Have Question of Suretyship Tried

When any suit is brought against two or more defendants upon any contract, any one or more of the defendants being surety for the other, the surety may cause the question of suretyship to be tried and determined upon the issue made for the parties defendant at the trial of the cause, or at any time before or after the trial or at a subsequent term. Such proceedings shall not delay the suit of the plaintiff.

Source: Art. 6246.

Rule 33. Suits By or Against Counties

Suits by or against a county or incorporated city, town or village shall be in its corporate name.

Source: Art. 1980.

Rule 34. Against Sheriff, etc.

Whenever a sheriff, constable, or a deputy or either has been sued for damages for any act done in his official character, and has taken an indemnifying bond for the acts upon which the suit is based, he may make the principal and surety on such bond parties defendant in such suit, and the cause may be continued to obtain service on such parties.

Source: Art. 1988.

Rule 35. On Official Bonds

In suits brought by the State or any county, city, independent school district, irrigation district, or

00480

Judge's Civil Docket, District Court, 288th Judicial District

Book size is 13" X 18" X 4 1/2
weighs appx 40 lbs 500 pages at end of 1983 CC Plus Misc Book

0048

NUMBER	NAME OF PARTIES	ATTORNEYS	ACTION OF SUIT	LAST ORDER	ORDERS, DECREES, ETC.
83 cv 664	Suit of James Patrick Davidson vs.	R. Chuck C. Dennis Jr.	Separation		
JAN 13 1983					
83 cv 675	Suit of Warren Howard, a child vs.	Ken Chamberlain	Made by order person C.		
JAN 13 1983					
83-C-00686	Kathryn L. Jackson vs. Ronald A. Jackson	William J. Grandone	Divorce	1-13-83	Rpt'r's Rec'd setting motion to modify Pk Relationship 2-22-83
JAN 14 1983				1-18-83	Issued non jury setting 3-28-83
				2-22-83	Entry Order of Dismissal
83-C-00697	Janet E. Van Horne vs. Harry W. Van Horne	Cheryl L. Wilson	Divorce	1-14-83	Williams Temp. Rest. Order and Order setting hearing for 2-11-83 at 9:00 am
JAN 14 1983				1-18-83	Issued Temp. orders
				1-21-83	Rivera non jury setting on the merits 3-25-83
				3-23-83	Yates Final Decree of Divorce Signed
83-C-00708	Santos Haro vs. Alma H. Haro	Peter G. Henry	Divorce	7-22-83	Clerk Divorce Closed
JAN 14 1983					
83-C-00718	In the Int. of Jennifer Hernandez & Henry Hernandez vs.	N/A	Support		DISMISSED W.O.P.
JAN 14 1983					JUN 26 1995

DISMISSED
W.O.P.
JUL 12 1984

CIVIL MINUTES

730A

Hand cover of minute book

00482

DISTRICT COURTS

DAVID J. GARCIA

DISTRICT CLERK

BEXAR COUNTY, TEXAS

Rule 26 RCP

CIVIL DOCKET

CASE NO. 88-CI-09571

NAME OF PARTIES	ATTORNEYS	ACTION OF SUIT	DATE OF FILING
88-CI-09571 05-27-88 288TH R MARBUT VS. V MARBUT	RICHARD ORSINGER	DIVORCE	08403

DATE OF ORDERS	ORDERS OF COURT
6-3-88 Yates	Order for Service of Process
6-3-88 Yates	Temp. Rest Writ & Setting
6-8-88 Orsinger	Order for Service of Process
Dec 9, 1988	Cassels - Order on Mot to withdraw as Counsel & Mot for substitution of Counsel James D. Fu
Dec 8, 1988	Spears - Order denying motion to strike Petitioner's Jury - setting
Dec 8, 1988	Cassels - Order on Mot to Accelerate Jury trial setting filed by Respondent
Dec 8, 1988	Spears - Order denying relief or Motion to strike Respondents Jury setting and Jury Demand.
1-6-89 Print	Agreed Decree of Divorce

(e) Each district clerk shall obtain an insurance policy to cover losses due to burglary, theft, robbery, counterfeit currency, or destruction. The amount of the policy may not exceed $20,000.

(f) The commissioners court shall pay the premiums on the bonds and insurance policies required under this section from the county general fund.

(g) In lieu of the bond required by Subsection (a), the county may self-insure against losses that would have been covered by the bond.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 71, §§ 3, 4, eff. May 7, 1987.

Historical Note

Section 3 of the 1987 amendment in subsec. (a) added "Except as provided by Subsection (g), before", in subsec. (b) inserted "if a bond is required" and inserted "or oath", in subsec. (d) inserted "at a reasonable cost", and § 4 added subsec. (g).

Prior Law:
Acts 1846, p. 203.
P.D. 500.
Rev.Civ.St.1879, art. 1102.
G.L. vol. 2, p. 1510.
Rev.Civ.St.1895, art. 1082.
Rev.Civ.St.1911, art. 1689.
Acts 1969, 61st Leg., p. 1711, ch. 561, § 1.
Acts 1979, 66th Leg., p. 1506, ch. 650, § 1.
Acts 1981, 67th Leg., p. 2071, ch. 462, § 1.
Vernon's Ann.Civ.St. art. 1897, §§ 1, 3 to 6.

§ 51.303. Duties and Powers

(a) The clerk of a district court has custody of and shall carefully maintain, arrange, and preserve the records relating to or lawfully deposited in the clerk's office.

(b) The clerk of a district court shall:

(1) record the acts and proceedings of the court;

(2) enter all judgments of the court under the direction of the judge; and

(3) record all executions issued and the returns on the executions.

(c) The district clerk shall keep an index of the parties to all suits filed in the court. The index must list the parties alphabetically using their full names and must be cross-referenced to the other parties to the suit. In addition, a reference must be made opposite each name to the minutes on which is entered the judgment in the case.

(d) On the last day of each term of the court, the district clerk shall make a written statement of fines and jury fees received. The statement must include the name of the party from whom a fine or jury fee was received, the name of each juror who served during the term, the number of days served, and the amount due the juror for the services. The statement shall be recorded in the minutes of the court after it is approved and signed by the presiding judge.

(e) The clerk of a district court may:

(1) take the depositions of witnesses; and

(2) perform other duties imposed on the clerk by law.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 354, § 1, eff. Aug. 31, 1987.

00484

CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

* * * P A R T Y S * * *

ENTERED	NAME			TYPE LITIGANT	NAME #
06/10/87	FIRST REPUBLICBANK SAN ANTONIO			PLAINTIFF	464316
06/10/87	FIRST REPUBLICBANK MEDICAL CENTE			PLAINTIFF	464317
06/10/87	REPUBLICBANK MEDICAL CETNER FKA			PLAINTIFF	464318
06/10/87	KALIFF	MENDEL	S	DEFENDANT	464319
06/10/87	BEXAR COUNTY SHERIFF			OTHER	464320
06/10/87	MERRILL	MARY	H	OTHER	464604
08/13/87	LEFLORE	JOHN		GARNISHEE	481513
11/09/87	KAUFMAN BECKER CLARE& PADGETT			DEFENDANT	508589

* * * A T T O R N E Y S * * *

ENTERED	NAME	ATTORNEY FOR	BAR #
	ADDRESS	CITY	ZIP
06/10/87	LUTHER SOULES III	PLAINTIFF	18858000
	800 MILAM BLDG	SAN ANTONIO TX	78205
12/07/87	JAMES BARROW	DEFENDANT	1831480
	1565 FROST BANK TOWER	SAN ANTONIO TX	78205

PA1 TO FORWARD SCAN PAGE
CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

* * * B O N D S * * *

ENTERED/ RELEASED	PERSON BONDED/ REASON	COMPANY	BOND AMOUNT	AGENT
06/10/87	1ST REPUBLICBANK SA ET AL		$10,000	MICHAEL N VENSON
00/00/00	BOND FOR ATTACHMENT	NATL (NATIONAL SURETY CORPORATION		
01/22/88	FIRST REPUBLICBANK S A NA		$1,000	LORETTA E.GARCIA
00/00/00	COST BOND ON APPEAL	NATL (NATIONAL SURETY CORPORATION		

* * * P R O C E E D I N G S * * *

ENTERED	TYPE PROCEEDING	DESCRIPTION
06/10/87	PLAINTIFF	ORIGINAL PETITION
06/10/87	SERVICE ASSIGNED TO	CLERK #3
06/10/87	APPLICATION FOR	WRIT OF ATTACHMENT
06/10/87	PLAINTIFF	MOTION FOR EXPEDITED DISCOVERY
06/16/87	SERVICE ASSIGNED TO	CLERK #6
06/15/87	MOTION FOR	SUBSTITUTED SERVICE
06/15/87	AFFIDAVIT	OF JOHN FURNISH
06/16/87	ORIGINAL	SUBPOENA DUCES TECUM
06/16/87	MOTION FOR	EXPEDITED DISCOVERY
06/16/87	MOTION FOR	EXPEDITED DISCOVERY
06/16/87	ORIGINAL	SUBPOENA DUCES TECUM

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CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

* * * P R O C E E D I N G S * * *

ENTERED	TYPE PROCEEDING	DESCRIPTION
06/19/87	MOTION FOR	SUBTITUTED SERVICE
06/19/87	SERVICE ASSIGNED TO	CLERK #4
06/23/87	AFFIDAVIT	FOR CITATION BY PUBLICATION
06/23/87	SERVICE ASSIGNED TO	CLERK #1
06/29/87	DEPOSITION OF	MARY H MERRILL
07/13/87	INTENTION TAKE DEPO	OF MITCHELL KALIFF
07/14/87	DEPOSITION OF	OF MITCHELL H KALIFF
07/13/87	CERTIFICATE OF	ADDRESS
07/13/87	NOTICE MAILED	MENDEL S KALIFF 226 BUSHNELL SAT
07/14/87	NOTICE MAILED	MENDEL S KALIFF P.O.BX 34991 SAT
07/2[illegible]	INTENTION TAKE DEPO	OF GEMFY PUTCHISON KALIFF

00485

08/12/87 MOTION TO SET D C 045 ON 08/17/87 AT 08:30
08/12/87 MOTION FOR PLTS FIRST MOTION TO COMPEL
08/12/87 NON APPEARANCE AFFIDAVIT OF JEMEY KALIFF
08/13/87 REQUEST FOR SUBPOENA DT
08/13/87 SERVICE ASSIGNED TO CLERK #3
PA1 TO FORWARD SCAN, P/P TO BACKWARD SCAN PAGE
CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

* * * P R O C E E D I N G S * * *

ENTERED	TYPE PROCEEDING	DESCRIPTION	SI
09/01/87	DEPOSITION OF	MITCHELL KALIFF	
11/04/87	SERVICE ASSIGNED TO	CLERK #5	
11/04/87	PLAINTIFF	APPL FOR TURNOVER 3RD PTY DEFT	
11/09/87	SERVICE ASSIGNED TO	CLERK #5	
12/07/87	DEFENDANT	KAUFMAN,BECKER,CLARE & PADGETT ORIG ANSR	
12/07/87	CONTINUED	PLEA IN ABATEMENT, & COUNTERCLAIM FOR	
12/07/87	CONTINUED	DECLARATORY RELIEF	
12/10/87	MOTION TO SET	D C 073 ON 12/17/87 AT 09:00	
12/10/87	MOTION FOR	PLTF AMENDED APPLICATION FOR TURNOVER LS	
01/22/88	APPELLANTS	LETTER REQUESTING TRANSCRIPT	
06/01/88	ORIGINAL	PARTIAL SATISFACTION OF JUDGMNT	

* * * O R D E R S * * *

ENTERED / VOLUME	TYPE ORDER / PAGE	AMOUNT	JUDGE	DESCRIPTION	SI
06/10/87	ORDER FOR			ISSUANCE OF WRIT OF ATTACHMENT OF PROP	
641	672	$0	ECW		
06/10/87	ORDER GRANTING			MOTION FR EXPEDITED DISCOVERY	
641	679	$0	ECW		

PA1 TO FORWARD SCAN, P/P TO BACKWARD SCAN PAGE
CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

* * * O R D E R S * * *

ENTERED / VOLUME	TYPE ORDER / PAGE	AMOUNT	JUDGE	DESCRIPTION	SI
06/16/87	ORDER GRANTING			PLFS MOT FR EXPEDITED DISCOVERY	
643	960	$0	JC		
06/15/87	ORDER FOR			SUB SERV ON MENDEL S KALIFF	
642	1067	$0	JC		
06/16/87	ORDER GRANTING			EXPEDITED DISCOVERY FRM MITCHELL KALIFF	
642	1069	$0	JC		
06/13/87	DEFAULT JUDGMENT				
646	104	$0	CRH		
07/13/87	ABSTRACT OF JUDGEMENT 5 ISSUED				
225	31	$0	XXX		
08/03/87	EXECUTIONS				
226	31	$0	XXX		
08/03/87	EXECUTIONS				
226	31	$0	XXX		
12/23/87	ORDER ON			PLTFS AMENDED APPLICATION FR TURNOVER	
675	930	$0	RR		

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CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED 06/10/87 COURT 57 DEPOSIT .00
LAST CHANGE 06/02/88 TYPE OF CAUSE NOTE

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00486

ENTERED / VOLUME	TYPE ORDER / PAGE	AMOUNT	JUDGE	DESCRIPTION
12/23/87	CONTINUED			SEVERENC OF APPLICTN FR TURNOVER ACTION
		$0	RR	
04/1 48	EXECUTIONS			6-10-88 UNABLE TO PAY NOT EXECUTED
73	137	$0	XXX	

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   TYPE SERVICE                    DIST  RCVD SHER   SRVD NTCE   BADGE #
SERVED ADDRESS                  SENT CLERK   SHOWN CITY
06/10/87   KALIFF                  MENDEL      S    70 NE LOOP 410 #440
   CITATION                        162   06/11/87    06/22/87       113
 226 BUSHELL UNDER 106 RUL  06/24/87      SAN ANTONIO, TX
06/10/87   BEXAR COUNTY SHERIFF                  70 NE LOOP 410
   WRIT ATTCHMNT FOR PROPERTY      182   06/12/87    06/12/87       101
 70 NE LOOP 410              00/00/00     UNK
06/10/87   KALIFF                  MENDEL      S    70 NE LOOP 410 #440
   PRECEPT TO SERVICE              182   06/11/87    06/22/87       113
 RULE 106 226 BUSHELL        06/24/87     SAN ANTONIO, TX
PA1 TO FORWARD SCAN, P/P TO BACKWARD SCAN                              PAGE
CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED   06/10/87    COURT   57      DEPOSIT          .00
LAST CHANGE  06/02/88 TYPE OF CAUSE    NOTE
                        * * * S E R V I C E S * * *
DATE ISS.  PERSON SERVED                        SHOWN ADDRESS          SE
   TYPE SERVICE                    DIST  RCVD SHER   SRVD NTCE   BADGE #
SERVED ADDRESS                  SENT CLERK   SHOWN CITY
06/11/87   MERRILL                 MARY        H    5759 SUN CANYON ROAD
   PRECEPT TO SERVICE                 0   06/11/87    06/11/87         0
 5759 SUN CANYON ROAD        06/12/87     SAN ANTONIO, TX
06/19/87   KALIFF                  MENDEL      S    226 BUSHNELL
   CITATION UNDER RULE 106          194   06/19/87    06/22/87       113
 226 BUSHNELL                06/24/87     SAN ANTONIO, TX
06/23/87   KALIFF                  MENDEL      S    UNK
   CIT BY PUB BY COMMERCL RCRDR       0   06/24/87    07/16/87         0
 UNK                         07/17/87     UNK
08/13/87   LEFLORE                 JOHN            130 EAST TRAVIS
   SUBPOENA DUCES TECUM            187   08/13/87    08/14/87       124
 130 EAST TRAVIS             08/17/87     SAN ANTONIO, TX
11/09/87   KAUFMAN BECKER CLARE& PADGETT          300 CONVENT SUITE 2300
   CITATION                        187   11/09/87    11/10/87       139
 300 CONVENT SUITE 2300      11/12/87     SAN ANTONIO, TX

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CAUSE NUM 87C10460STYLE:FIRST REPUBLICBANK VS MENDEL S KALIFF
DATE FILED   06/10/87    COURT   57      DEPOSIT          .00
LAST CHANGE  06/02/88 TYPE OF CAUSE    NOTE
                        * * * S E R V I C E S * * *
DATE ISS.  PERSON SERVED                        SHOWN ADDRESS          SE
   TYPE SERVICE                    DIST  RCVD SHER   SRVD NTCE   BADGE #
SERVED ADDRESS                  SENT CLERK   SHOWN CITY
04/14/88   KALIFF                  MENDEL      S    MERCANTILE BANK
   WRIT OF EXECUTION               194   06/01/88    01/06/88        82
 RET NULLA BONA              06/09/88     SAN ANTONIO, TX
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LAST PAGE, P/P TO BACKWARD SCAN PAGE

51.303(b)(2) 8(c)

LITIGANT.NAME			LITIGANT.TYPE	CASE.NUMBER	COURT
MARTINEZ	MELINA		RESPONDENT	88C11926	45
....CROSS.PARTY(S).:MARTINEZ.....SERGIO.....J;.....					
MARTINEZ	MICHAEL		MINOR	88C08468	73
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ORDERS : V0704/P1006 05/11/88 ORDER APPOINTING			GUARDIAN AD LITEM		
....V0704/P1004..05/12/88..JUDGEMENT.....					
MARTINEZ	MICHAEL		DEFENDANT	88C11186	45
CROSS PARTY(S) :STATE OF TEXAS		; MATTOX ATTY GEN	JIM	; MARTINEZ	ROSELINDA E;
ORDERS : V0729/P0958 08/23/88 ORDER ON			SUPPORT OBLIGATION OR AMOUNT		
V0729/P0958 08/29/88 ORDER ADOPTING			MASTERS REPORT		
V0731/P0173 09/01/88 EMPLOYERS ORDER			TO WITHHOLD INCOME		
V0743/P0942 10/25/88 ORDER ON			SUPPORT OBLIGATION OR AMOUNT		
V0743/P0942 10/31/88 ORDER ADOPTING			MASTERS REPORT		
....V0743/P0945..10/31/88..EMPLOYERS.ORDER.....TO.WITHHOLD.EARNINGS.FOR.CHILD.SUPPORT.....					
MARTINEZ	MICHAEL	A	RESPONDENT	88C13451	225
CROSS PARTY(S) :MARTINEZ	OLGA	M;			
ORDERS : V0738/P0519 10/05/88 DECREE OF			DIVORCE		
....V0738/P0519..10/05/88..CHILD.SUP..ASSESSED....MICHAEL.A.MARTINEZ.....					
MARTINEZ	MICHAELA	C	DEFENDANT	88C19130	285
CROSS PARTY(S) :URBAN RENEWAL AGENCY OF THE CITY		; UNKNOWN HEIRS OF EUGENIO CORTEZ		; CORTEZ	EUGENIO ;
RAMOS	MARY ALICE ;				
ORDERS : V0000/P0000 11/17/88 ORDER FOR			DECLARATORY JDGMT FOR MARY ALICE RAMOS		
....V0000/P0000..11/17/88..CONTINUED.....&.MICAELA.CORTEZ.MARTINEZ.....					
MARTINEZ	MIGUEL		DEFENDANT	88C17543	285
....CROSS.PARTY(S).:TAITAGUE.....WILLIAM.....;.WEST.COAST.PRODUCE.CO.INC.....;					
MARTINEZ	MONICA		RESPONDENT	88C14921	131
....CROSS.PARTY(S).:MARTINEZ.....JOSE.....R;.....					
MARTINEZ	NANCY	V	PETITIONER	88C01400	45
....CROSS.PARTY(S).:MARTINEZ.....JERRY.....F;.....					
MARTINEZ	NORMA		DEFENDANT	88C00483	225
CROSS PARTY(S) :ITT FINANCIAL SERVICES		; MARTINEZ	JUAN	;	
ORDERS : V0685/P0614 02/10/88 DEFAULT JUDGMENT					
....V0735/P0229..02/23/88..ABSTRACT.OF.JUDGEMENT.....					
MARTINEZ	NORMA	J	RESPONDENT	88C17056	45
CROSS PARTY(S) :MARTINEZ	RUBEN	M;			
....ORDERS.:.V0738/P0196..09/28/88..ORDER.FOR.....SERVICE.OF.PROCESS.....					
MARTINEZ	NORMA	L	RESPONDENT	88C03021	285
CROSS PARTY(S) :CALANDRA	JONATHAN	S; LEAL	MICHAEL	J; CALANDRA	MICHAEL J;
ORDERS : V0690/P0893 03/04/88 DECREE			GRANTING MINOR'S CHANGE OF SURNAME		
....V0000/P0000..03/09/88..CASE.CLOSED.....REVIEW.COMPLETED.....					
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MARTINEZ	OLGA	B	PETITIONER	88C14538	224
....CROSS.PARTY(S).:MARTINEZ.....HUMBERTO.....;					
MARTINEZ	OLGA	H	RESPONDENT	88C01674	288
....CROSS.PARTY(S).:MARTINEZ.JR.....JUAN.....P;.....					
MARTINEZ	OLGA	L	RESPONDENT	88C20179	73
....CROSS.PARTY(S).:MARTINEZ.....HECTOR.....Q;.....					
MARTINEZ	OLGA	M	PETITIONER	88C13451	225
CROSS PARTY(S) :MARTINEZ	MICHAEL	A;			
ORDERS : V0738/P0519 10/05/88 DECREE OF			DIVORCE		
....V0738/P0519..10/05/88..CHILD.SUP..ASSESSED....MICHAEL.A.MARTINEZ.....					
MARTINEZ	ORALIA	V	PETITIONER	88C10481	225

60483

CASE NO. 73-CI-106

STYLED DELIA GLORIA TRIGO

VS AND STEVE TRIGO

REEL NO. 2911 IMAGE NOS 0079 THRU 0088

DAVID J. GARCIA
DISTRICT CLERK BEXAR COUNTY
TEXAS

7-6-84 BY Minfa Chavez
DATE FILED DEPUTY CLERK

NO. 73-CI-100

IN THE MATTER OF THE MARRIAGE OF	I	IN THE DISTRICT COURT
DELIA GLORIA TRIGO	I	166th JUDICIAL DISTRICT
AND STEVE TRIGO	I	BEXAR COUNTY, TEXAS

DECREE OF DIVORCE

ON THIS the 8th day of March, 1973, came on to be heard the above styled and numbered cause, and came the Petitioner in person and by attorney and announced ready for trial, and the Respondent having been duly cited by personal service, did not appear but wholly made default.

The Court, after examining the records herein and listening to the evidence and argument of counsel, finds that it has jurisdiction over this cause and the parties hereto and that Petitioner's Original Petition for Divorce has been on file in this Court for at least sixty (60) days.

The Court finds that at the time of the filing of this suit, Petitioner had been a domiciliary of this state for the preceding twelve (12) month period and a resident of the county in which the suit was filed for the preceding six (6) month period.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the bonds of matrimony heretofore existing between the Petitioner DELIA GLORIA TRIGO and Respondent, STEVE TRIGO be and are hereby dissolved, and a decree of divorce is hereby granted.

The Court finds that there are no children now under eighteen (18) years of age born to or adopted by this marriage and none are expected.

The Court finds that no community property was accumulated during the marriage other than personal effects, which should be awarded to the person having possession.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that each party hereto take as his or her sole and separate property all such as is presently in his or her possession.

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The Court finds that it would be advantageous to Petitioner to have her former name of MORENO restored to her.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Petitioner's name be and is hereby changed to MORENO.

Signed and entered this 5th day of March, 1973.

JUDGE PRESIDING

55,303 Bankruptcy

LITIGANT NAME			LITIGANT TYPE	STYLE	CAUSE NO.	DT FILED	DOCKET TYPE
ACOSTA	ESTRELLA	M	PETITIONER	ESTRELLA M ACOSTA VS ROBERTO ACOSTA	89-CI-00008	01/03/89	DIV
ACOSTA	ROBERTO		RESPONDENT	ESTRELLA M ACOSTA VS ROBERTO ACOSTA	89-CI-00008	01/03/89	DIV
ACOSTAR CORPORATION			DEFENDANT	LADD S LITTLE VS KEVIN B HALTER ET AL	89-CI-00121	01/04/89	DEBT
ADALBERTO ALVAREZ PIPELINE DBA			DEFENDANT	HARTFORD CASUALTY INS CO VS ADALBERTO ALVAREZ	89-CI-00056	01/04/89	AGREE
AGUILAR	ROSS		PETITIONER	ROSS AGUILAR VS CISSY AGUILAR/QUILT	89-CI-00259	01/06/89	DIV
AGUILAR/QUILT	CISSY		RESPONDENT	ROSS AGUILAR VS CISSY AGUILAR/QUILT	89-CI-00259	01/06/89	DIV
AGUINAGA JR	JOEL		DEFENDANT	DOROTHY VEALE ET AL VS JOE AGUINAGA JR ET AL	89-CI-00143	01/05/89	ADMPI
AGUIRRE	JUAN		DEFENDANT	ROY HEMBY ET AL VS JUAN AGUIRRE	89-CI-00145	01/05/89	ADMPI
AHMAD	JANET		PLAINTIFF	JANET AHMAD VS MARILYN L HAMMOND	89-CI-00202	01/05/89	DM
AKE	TRACY	K	PETITIONER	TRACY KAY AKE VS LARRY WAYNE AKE JR	89-CI-00146	01/05/89	DIV
AKE JR	LARRY	W	RESPONDENT	TRACY KAY AKE VS LARRY WAYNE AKE JR	89-CI-00146	01/05/89	DIV
AKEROYD	THOMAS		PLAINTIFF	STATE OF TEXAS VS TWO THOUSAND FOUR HUNDRED EIGHTY	89-CI-00246	01/06/89	NOS
AL-ZAHRANI	DIANA	G	PETITIONER	DIANA G AL-ZAHRANI VS HASSAN ASSAF AL-ZAHRANI	89-CI-00148	01/05/89	DIV
AL-ZAHRANI	HASSAN	A	RESPONDENT	DIANA G AL-ZAHRANI VS HASSAN ASSAF AL-ZAHRANI	89-CI-00148	01/05/89	DIV
ALAMO CEMENT COMPANY			PLAINTIFF	ALAMO CEMENT CO VS APPRAISAL REVIEW BOARD BEXAR CO	89-CI-00153	01/05/89	PJRAD
ALAMO NATIONAL BANK			DEFENDANT	MBANK ALAMO VS SOL E ARLEDGE	85-CI-16422	01/06/89	DEBT
ALL THINGS IRISH			DEFENDANT	NBC BANK-SAN ANTONIO NA VS ALL THINGS IRISH	89-CI-00050	01/03/89	NOTE
ALTMAN	WILLIAM	M	DEFENDANT	SASA VS WILLIAM M ALTMAN & ALTMAN DATA SERVICES	89-CI-00179	01/05/89	NOS
ALTMAN DATA SERVICES INC			DEFENDANT	SASA VS WILLIAM M ALTMAN & ALTMAN DATA SERVICES	89-CI-00179	01/05/89	NOS
ALVARADO	JACQUELINE	L	PETITIONER	JACQUELINE L ALVARADO VS JESUS RAUL ALVARADO JR	89-CI-00151	01/05/89	DIV
ALVARADO JR	JESUS	R	RESPONDENT	JACQUELINE L ALVARADO VS JESUS RAUL ALVARADO JR	89-CI-00151	01/05/89	DIV
ALVAREZ	ADALBERTO		DEFENDANT	HARTFORD CASUALTY INS CO VS ADALBERTO ALVAREZ	89-CI-00056	01/04/89	AGREE
ALVAREZ	IGNACIO		PLAINTIFF	IGNACIO ALVAREZ ET AL VS ROSIEK CONST CO ET AL	89-CI-00125	01/04/89	ADMPI
AMADOR	MARIA	O	PETITIONER	MARIA ORALIA AMADOR VS ROBERTO AMADOR HERNANDEZ	89-CI-00062	01/04/89	DIV
AMERICAN SIGNAL EQUIP CO			DEFENDANT	IGNACIO ALVAREZ ET AL VS ROSIEK CONST CO ET AL	89-CI-00125	01/04/89	ADMPI
ANDERSON	KELLIE	M	RESPONDENT	AFIF AHMED KHERAIS VS KELLIE MAUREEN ANDERSON	89-CI-00181	01/05/89	DIV
ANGELINI	LAURA		DEFENDANT	ODELL M GARCIA ET AL VS FIREMAN'S FUND MORTGAGE CO	89-CI-00005	01/03/89	INJ
AP BOEGNER & ASSOCIATES DBA			PLAINTIFF	A P BOEGNER ET AL VS HENRY GRAINGER ROGERS ETAL	89-CI-00079	01/04/89	INJ
APPRAISAL REVIEW BOARD BEXAR CO			DEFENDANT	ALAMO CEMENT CO VS APPRAISAL REVIEW BOARD BEXAR CO	89-CI-00153	01/05/89	PJRAD
ARAMBULA	MARTIN		PETITIONER	EX PARTE MARTIN ARAMBULA	89-CI-00024	01/03/89	CON
ARLITT	JANET		DEFENDANT	G C HOLDING CO INC VS MARGIE V ARLITT ET AL	89-CI-00217	01/05/89	DM
ARLITT	MARGIE	V	DEFENDANT	G C HOLDING CO INC VS MARGIE V ARLITT ET AL	89-CI-00217	01/05/89	DM
ARLITT III	WILLIAM	H	DEFENDANT	G C HOLDING CO INC VS MARGIE V ARLITT ET AL	89-CI-00217	01/05/89	DM
ARLITT JR EST OF	WILLIAM	H	DEFENDANT	G C HOLDING CO INC VS MARGIE V ARLITT ET AL	89-CI-00217	01/05/89	DM
ARMSTRONG	LEAL A	S	PETITIONER	LEAL A S ARMSTRONG VS RONALD R ARMSTRONG	89-CI-00184	01/05/89	DIV
ARMSTRONG	LISA	D	DEFENDANT	UNICORP AMERICAN CORP VS LISA DAWN ARMSTRONG ETAL	89-CI-00068	01/04/89	LEASE
ARMSTRONG	RONALD	R	RESPONDENT	LEAL A S ARMSTRONG VS RONALD R ARMSTRONG	89-CI-00184	01/05/89	DIV
ARNOLD	CLEONA	F	PETITIONER	CLEONA FAYE ARNOLD VS JESUS GILBERTO GOMEZ	89-CI-00225	01/06/89	DIV
ASH	SANDRA	L	DEFENDANT	JESUS MENDOZA VS SANDRA L ASH	89-CI-00215	01/05/89	DM
ASHER	JUAN	V	RESPONDENT	SANDRA R ASHER VS JUAN V ASHER	89-CI-00249	01/06/89	DIV
ASHER	SANDRA	R	PETITIONER	SANDRA R ASHER VS JUAN V ASHER	89-CI-00249	01/06/89	DIV
ATWELL	WILLIAM	W	PLAINTIFF	WILLIAM W ATWELL VS J B COCINAS INC & J B GOUGER	89-CI-00015	01/03/89	INJ
AUTO SPA INC			DEFENDANT	JOHN SCHRAUB VS THE PIT PROS INC	89-CI-00096	01/04/89	AGREE
AUTOMASTERS WRECKER CO			PLAINTIFF	BILLIE JEAN BAKER ETAL VS ROCKY M WILLIAMS ET AL	89-CI-00155	01/05/89	INJ
BACKOS	WENDY		DEFENDANT	STANLEY BROWN VS WENDY BACKOS	89-CI-00160	01/05/89	ADMPI
BAD SCHLOSS INC			DEFENDANT	KATHY OTT ET AL VS RUBERT (BOB) HENRY ET AL	89-CI-00239	01/06/89	PID
BAKER	BILLIE	J	PLAINTIFF	BILLIE JEAN BAKER ETAL VS ROCKY M WILLIAMS ET AL	89-CI-00155	01/05/89	INJ
BALDWIN	BRYAN	R	RESPONDENT	LEODA J ORSACK BALDWIN VS BRYAN R BALDWIN	89-CI-00007	01/03/89	DIV
BALL	LUDLOW		DEFENDANT	BRAZOS V GUIDO VS LUDLOW BALL	89-CI-00172	01/05/89	ADMPI
BALSON	JUDITH	J	PLAINTIFF	JUDITH JEAN BALSON VS CITY OF SAN ANTONIO	89-CI-00044	01/03/89	PID
BAMBERGER	DAVID	K	RESPONDENT	DEBORAH GENE BAMBERGER VS DAVID KEITH BAMBERGER	89-CI-00262	01/06/89	DIV

JOINT COURT ORDER APPROVING THE BEXAR COUNTY DISTRICT CLERK'S PLAN FOR MICROFILMING CIVIL RECORDS

BE IT REMEMBERED that on this the 12th day of January, A.D. 1976, that we, the undersigned District Judges of Bexar County, Texas, have inspected and do hereby approve the District Clerk's plan for microfilming civil records and find said plan to be in accord with the provisions set forth in V.A.C.S. 1899a.

WITNESS our hands:

Judge, 37th District Court

Judge, 45th District Court

Judge, 57th District Court

Judge, 73rd District Court

Judge, 131st District Court

Judge, 144th District Court

Judge, 150th District Court

Judge, 166th District Court

Judge, 175th District Court

Judge, 186th District Court

Judge, 187th District Court

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PLAN FOR MICROFILMING RECORDS OF THE DISTRICT CLERK

Pursuant to the provisions of Article 1899a, as added to Title 40, Revised Civil Statutes of Texas, by the 62nd Legislature, the District Clerk of Bexar County provides the following plan for microfilming and reproducing of all records, acts, proceedings held, minutes of the Court or Courts, and including all registers, records and instruments for which the District Clerk is or may become responsible by law.

A. All original instruments, records, and minutes shall be recorded and released into the file system within 48 hours after presentation to the clerk.

B. Original paper records may be used during the pendency of any legal proceedings.

C. To insure that an image produced during microfilming can be certified as a true and correct copy of the original and that the image may be retreived rapidly, the following procedures will be observed:

1. The clerk's file stamp will be affixed to the instrument.

2. A log of all instruments being microfilmed will be maintained. This log will contain: date, case number, snd beginning and ending film code number.

3. The Clerk's Authority Certificate will befilmed at the beginning and end of each roll.

4. Camera Operators will maintain a log of all operations and will be made accountable for each frame and roll processed. Log totals must correspond with machine counter.

5. Microfilm Processor Operators will check microfilm processed to verify all conditions are operational.

6. The resolution of each image will be checked.

7. Duplicate working copies of all film will be made and checked.

8. The working copy of the film will be periodically checked and if found to be worn, will be replaced.

9. The original film will be stored off the premises for security purposes.

D. All materials to be used in the microfilming and all processes of development, fixation and washing shall be of quality approved for permanent photographic records by the United States Bureau of Standards.

E. To insure permanent retention of the records, the standards in (D) above will be followed. In addition, the District Clerk will follow closely the developments and will incorporate these new techniques as the state of the art improves. Also, as previously mentioned, a duplicate copy of the original microfilm will be maintained and reproduced if necessary. One copy will be available to users and the other copy will be placed in the Archives for security provisions. The original microfilm roll will be retained in an off-premises storage meeting at least the minimum storage requirement for Archival records. To prevent questions from arising regarding the entirety of the records or the integrity of the Clerk's files, alterations willbe eliminated by establishing procedures for corrections,retakes, and other variations from the routine filming, as follows:

   1. Permanent-record roll film of archival quality will be used for the security film with no corrections made by cutting or splicing except as indicated in these procedures.

   2. Clerk's Certificate will be filmed at the beginning and end of each roll of film.

   3. Retakes will be made only when the original microfilm shows a lack of proportionality in an image resulting from defects in the optical system or if an instrument is skipped showing a break in the continuity of the microfilm code numbers.

F. As provided in Section 4 of Article 1899a, instruments which meet all requirements of the law will be destroyed.

G. Due to rapid advances in both microfilm processes and computer processes, this plan may require modification. If so, the District Clerk will submit proposed ammendments to the District Judges for approval.

ROLL No. 2911 DATE 9/26/85

DUPLICATE

START _____ END _____

MICROFILM RECORDS FILE

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THW & 73-CI-414

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NO. 87-CI-21524

IN THE MATTER OF THE MARRIAGE OF	*	IN THE DISTRICT COURT
ELIA LUPE GOMEZ AND JIMMY H. GOMEZ	*	225TH JUDICIAL DISTRICT
AND IN THE INTEREST OF CHRISTOPHER M. GOMEZ, A MINOR	*	BEXAR COUNTY, TEXAS

ORDER ON MOTION TO MODIFY IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

On August 15, 1988, hearing was had on Movant's Motion To Modify in Suit Affecting the Parent-Child Relationship.

APPEARANCES

Movant, JIMMY H. GOMEZ, appeared in person and by attorney and announced ready for trial.

Respondent, ELIA LUPE GOMEZ, appeared in person and by attorney and announced ready for trial.

JURISDICTION

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that it has continuing, exclusive jurisdiction of this cause and of all the parties and that no other court has continuing, exclusive jurisdiction. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. All persons entitled to citation were properly cited.

CHILD

The Court finds that the child the subject of this suit is:

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NAME:	CHRISTOPHER M. GOMEZ
SEX:	MALE
BIRTHPLACE:	SAN ANTONIO, TEXAS
BIRTH DATE::	JUNE 30, 1973
PRESENT RESIDENCE:	6023 ROYAL CREEK, SAN ANTONIO, TEXAS
HOME STATE	TEXAS

FINDINGS

The Court finds that Managing Conservator has consented to entry of this Modification Order as evidence by Managing Conservator's signature below and that this Modification is in the best interest of the child.

IT IS, THEREFORE, ORDERED that the Motion is GRANTED to the extent herein stated.

JOINT MANAGING CONSERVATORS

IT IS ORDERED AND DECREED that Movant, JIMMY H. GOMEZ, and Respondent, ELIA LUPE GOMEZ, are appointed Joint Managing Conservators of the Child, and that they shall share jointly the following joint rights, duties, powers, and privileges:

the right to have physical possession of the Child;

the duty of care, control, protection, moral and religious training, and reasonable discipline of the Child;

the duty to support the Child, including providing the Child with clothing, food, shelter, medical care, and education;

the duty to manage the estate of the Child, except when a guardian of the estate has been appointed;

the right to the services and earnings of the Child;

the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and

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surgical treatment;

the power to represent the Child in legal action and to make other decisions of substantial legal significance concerning the Child;

the power to receive and give receipt for payments for the support of the Child and to hold or disburse any funds for the benefit of the Child; and

any other rights, privileges, duties, and powers existing between a parent and Child by virtue of law.

IT IS ORDERED that the residence of the child for purposes of establishing the Court of continuing jurisdiction shall be Bexar County until altered by further order of the Court.

IT IS ORDERED that JIMMY H. GOMEZ shall have the primary custody and control of the Child and shall have possession at all times, other than as specified in this decree.

IT IS ORDERED that since the child is fifteen (15) years of age, there shall be no mandatory visitation rights between the parties with respect to the child, and IT IS, THEREFORE, ORDERED that ELIA IJPE GOMEZ shall have possession of Child at all times as are agreeable to ELIA IJPE GOMEZ and the child.

SUPPORT

The Court finds that due to the joint managing conservatorship ordered herein, that it is in the best interest of the child that neither party be required to pay child support.

IT IS, THEREFORE, ORDERED that neither JIMMY H. GOMEZ or ELIA IJPE GOMEZ shall be required to pay child support to the other party.

PREVIOUS FINAL ORDERS

IT IS FURTHER ORDERED that all previous final Orders not otherwise herein modified are retained and ratified as if recited herein verbatim.

ATTORNEY'S FEES

IT IS ORDERED that both parties shall be solely responsible for their own attorney's fees with respect to this modification.

COSTS

All costs of court exponded in this cause are taxed against the party incurring the costs, for which let execution issue.

SIGNED this 29th day of August, 1988.

JUDGE PRESIDING

APPROVED:

H. E. MENDEZ
Attorney at Law
2424 InterFirst Plaza
300 Convent Street
San Antonio, Texas 78205
(512)224-4081

By: Richard A. Lybarger
RICHARD A. LYBARGER
State Bar No. 12712010
ATTORNEY FOR RESPONDENT

E. Nicholas Milam
NICHOLAS MILAM
State Bar No.14033700
ATTORNEY FOR MOVANT

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LHS

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

Sadler
Sabo
Hill
Hagenda

November 30, 1987

Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Re: Direct Actions Against Insurers
and Rules 38(c) and 51(b), T.R.C.P.

Dear Doak:

I received your note of the 19th with memos and correspondence today. An incorrect zip code and the vagaries of the county's in-house mail service are the culprits.

The memo from Eddie Molter to Judge Robertson of October 30, 1986, is incomplete. I received pages 1, 3, 5 and 7. What about the others? Is the Chuck Lord memo to Judge Wallace only a single page? Can you help on this? Can Broadus?

I am sending a letter out to some selected practitioners and academics soliciting their views. It would seem from the memos that a rule change alone would not be enough to usher in direct actions. This would be such a big change in our practice it should be approached cautiously.

I am copying Broadus Spivey, Luke Soules and the members of the COAJ "think tank" subcommittee. I would like to send my fellow think tankers copies of the complete memos. I will send you, Broadus and Luke copies of anything my letter generates.

Very truly yours,

Mike

Michael D. Schattman

MDS/lw

00499

xc: B. Spivey, L. Soules, Mike Handy, Bill Dorsaneo, Pat Hazel, Charles Tighe

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December 9, 1987

Mr. Sam Sparks
Grambling and Mounce
P. O. Drawer 1977
El Paso, Texas 79950-1977

Re: Tex. R. Civ. P. 38(c) and 51(b)

Dear Sam:

I have enclosed a letter sent to me through Michael D. Schattman regarding Rules 38(c) and 51(b). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHS/hjh
SCACII:003
Enclosure
cc: Justice James P. Wallace
Mr. Michael D. Schattman

00500

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October 23, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248
Capitol Station
Austin, Texas 78767

Dear Justice Wallace:

At the request of Broadus Spivey made at the SCAC session of June 27, 1987, I appointed a Special Subcommittee to study TRCP 38(c) and 51 (b) which deal with the same subject, i.e. "direct actions." That committee consists of Frank Branson, Franklin Jones, and Broadus Spivey, who are to work with Sam Sparks (El Paso) who is the Standing Subcommittee Chair for Rules 15-166a.

The work of this subcommittee on these rules will likely be one of the leading studies for the proposed rules admendments to be effective January 1, 1990. By copy of this letter, I am requesting that Doak Bishop, Chairman of the COAJ for the ensuing year, set up a similar special subcommittee to investigate these rules to determine whether today in Texas direct actions should be permissible under the Rules of Civil Procedure.

I hope this sufficiently responds to your inquiry.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
xc: Mr. Doak Bishop
Chairman COAJ

Mr. Frank Branson
Mr. Franklin Jones
Mr. Broadus Spivey

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INVESTIGATORS†
JOHN C. LUDLUM
RICK LEEPER

BUSINESS MANAGER:
MELVALYN TOUNGATE

November 9, 1987

BAS87.266

Hon. Sam Sparks
Grambling and Mounce
Texas Commerce Building
P. O. Drawer 1977
El Paso, Texas 79950-1977

Re: Special Subcommittee - TRCP 38(c) and 51(b)
Direct Actions

Dear Chairman Sam:

Since I have really dropped the ball on this assignment, I need to call upon you for help in restoring my appearance of reliability.

On June 27, 1987, Luke Soules appointed a special subcommittee to study these rules. The subcommittee consists of you as chairman, Frank Branson, Franklin Jones, and myself as members.

I inquired of Justice Wallace as to the existence of any briefing or information that had accumulated with the Supreme Court over a period of years. This has been a rather lively topic of discussion in the legal community ever since I have been practicing, and I knew the Supreme Court had to have some material gathered. On July 8, 1987 Judge Wallace forwarded to me copies of research done on the subject. Like a good committee member, I procrastinated "until tomorrow." Now, "manaña" has come.

I am forwarding a copy of the material furnished to me by Judge Wallace and a copy of his accompanying letter of July 8, 1987.

We need to get together, and that should be without further delay. It will make you look good to act in a rather hasty fashion while you can compare your conduct with my speed.

Additionally, I have received several inquiries from lawyers who are not even members of our committee and some from defense lawyers, too, asking when we were going to move on this issue. There is more interest than I had thought. I would suggest a Thursday or Friday meeting in Austin within the next three or four weeks.

I apologize to you, Luke Soules, and especially to Judge Wallace, for my inertia.

Sincerely,

Broadus A. Spivey

BAS:jk

c: Hon. James P. Wallace
Mr. Luther H. Soules III
Mr. Frank Branson
Mr. Franklin Jones
Mr. Doak Bishop, Chairman, COAJ

6202

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 8, 1987

87 JUL 10 A9:51

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
Austin, Texas 78768

Dear Broadus:

As per your request of last week, I am forwarding copies of research done by various court personnel into direct action against insurance companies in Texas. I hope this is of some help to you and I look forward to your subcommittee report to the Supreme Court Advisory Committee.

Sincerely,

James P. Wallace
Justice

JPW/cw

00504

EARLY DEVELOPMENT OF LAW AND EQUITY IN TEXAS

Burke in his *Tract on the Popery Laws* used the famous dictum:

> "There are two, and only two, foundations of law, equity and utility."

In the Texas constitutional convention of 1845, Thomas J. Rusk, the President of the Convention, paraphrased Burke's dictum and a text he had learned from Blackstone, in these words:

> "When cases are to be decided, the eternal principles of right and wrong are to be first considered, and the next object is to give general satisfaction in the community."[1]

He was advocating the employment of juries in equity cases. He urged that juries were better acquainted with the neighborhood and local conditions and circumstances than a chancellor and were generally as competent in suits in equity as in cases at law.

> "And if twelve men determine against a man he does not go away abusing the organs of the law; he comes to the conclusion that he is in the wrong."

The proposed jury "innovation"—for it was an innovation in American jurisprudence—was not adopted without strong opposition, led by Chief Justice John Hemphill, who was Chairman of the Committee on Judiciary. In the course of his address on the subject, Judge Hemphill said:

> "I cannot say that I am very much in favor of either chancery or the common-law system. I should much have preferred the civil law to have continued here in force for years to come. But inasmuch as the chancery system, together with the common law, has been saddled upon us, the question is now whether we shall keep up the chancery system or blend them together. If we intend to keep it up as it is known to the courts of England, of the United States, and of many of the states, we should oppose this

[1] *Debates of the Texas Convention*, Sess. July 28, 1845, Wm. F. Weeks, reporter, published by the authority of the convention (Houston, 1846) p. 274.

> innovation; for I do not know of any alteration which could be a greater innovation."[2]

It will be necessary to recall that Texas declared its independence of Mexico on March 2, 1836. The Constitution of the Republic of Texas, adopted on March 17, 1836, had provided[3] that the Congress of the Republic should, by statute,

> "introduce the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of decision."

Until such time as the Congress should act in this regard, the "laws now in force in Texas" were to remain in force. The convention of 1836 broke up in disorder because of the shocking news of the fall of the Alamo and the invasion in force of the Mexican armies under the dictator, General Santa Anna. The first three congresses of the young Republic were engrossed largely with war legislation and political measures. On Jan. 20, 1840, the Fourth Congress in terms repealed "all the laws in force in this Republic prior to the first of Sept., 1836," (i. e., the Mexican and Spanish law, including their common law, which is essentially Roman) and enacted that,

> "the common law of England (so far as it is not inconsistent with the constitution or the acts of Congress now in force) shall, together with such acts, be the rule of decision in this Republic."

To the superficial observer, it might seem that in the contest on this remote frontier, the common law of England had gained the day over the civil law of Rome by reason of its greater virility and superior excellence. The colonists who were the fathers of the Republic of Texas were almost exclusively Anglo-Saxons, emigrants from the United States. They had come so recently under Mexican rule that they had neither time, facilities, nor inclination to become familiar with the Spanish language and the Spanish jurisprudence. Even the great Hemphill arrived in Texas as late as 1838 and acquired his knowledge of the Spanish law after that date. The wide expanse of country embraced in the Republic was very sparsely settled (the total

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[2] *Ibid.*, pp. 271-272.
[3] Art. IV, sec. 13.

population estimated at 20,000), the ox-cart was the usual means of transportation, Indian raids and Mexican incursions kept all the men virtually under arms, and the population were put to it to produce enough from the soil to keep alive. The simple fact is the early Texans neither gave nor could give any discriminating thought to their system of private law. This question was overshadowed by the greater public questions of the maintenance of independence, of annexation to the United States, of public land grants, and slavery. Besides, after their experience with Mexican cruelty and treachery, they had a natural suspicion of everything Mexican. Little wonder then that they abruptly rejected a system of law which was contained in a strange language and adopted a system with which they were familiar and the records of which were written in their own tongue. Had the local conditions been different then, it is possible Texas like Louisiana, could have been cited by Dr. Hannis Taylor as a striking corroboration of his thesis that,

> "out of this fusion of Roman private and English public law there is arising throughout the world a new and composite state system, whose outer shell is English constitutional law, including jury trials in criminal cases, and whose interior code is Roman private law."[4]

It is a fact, however, that the Republic of Texas retained much of "the law as it aforetime was."

Having adopted the English common law as "the rule of decision," the Congress proceeded immediately by various statutory enactments to introduce important modifications of the common law. The Spanish community system of marital property rights was retained[5]; common-law rules as to succession were replaced by the civil-law rules[6]; the laws[7] exempting property, including the homestead, from forced sale were taken from Spanish prototypes[8]; the doctrines of the common law as to the estates arising

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[4] Address before the Texas Bar Association, *Proceedings* (1914) p. 178.
[5] Act, Jan. 20, 1840.
[6] Acts, Jan. 28, 1840, and Feb. 5, 1840.
[7] Acts, Jan. 26, 1839, and Dec. 22, 1840.
[8] Sayles, *Early Laws of Texas*, Introduction by Judge Willie, p. vi. Dillon, *Laws and Jurisprudence of England and America*, p. 360, writes: "The Republic of Texas passed the first homestead act in 1836. It was the gift of the infant Republic of Texas to the world." The act of Jan. 26, 1839, is the first Texas legislation on the subject of the homestead.

under a mortgage were entirely disregarded in the act of Feb. 5, 1840, providing for the foreclosure of mortgages on real and personal property to satisfy "the lien created by the making of the mortgage"; the common-law rules as to the assignment of choses in action were abolished, as were also livery of seisin and common-law formalities in conveyancing.[9] The act of Jan. 28, 1840, on wills retained the legitime and other features of the civil law; and most sweeping of all, the act of Feb. 5, 1840, expressly discarded the entire common-law system of pleading and provided,

> "that the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer."[10]

In the interval between the enactment of the last mentioned act and the constitutional convention of 1845, and in the face of the rejection of the common-law system of pleading, various statutes were enacted which referred in terms to the twofold jurisdiction of law and chancery. The very act of Feb. 5, 1840, which preserved the former simple system of "petition and answer"—a system to which the artificial distinction between actions at law and in equity was wholly foreign—contains a clause providing that,

> "in every civil suit in which sufficient matter of substance may appear upon the petition to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form; the court shall in the first instance endeavor to try each cause by the rules and principles of law; should the cause more properly belong to equity jurisdiction, the court shall, without delay, proceed to try the same according to the principles of equity."

This is a general exemption statute. The distinctive provision that the homestead owned by a married man could not be alienated by him without the consent of his wife first appeared in the constitution of 1845 by vote of the convention taken Aug. 5, 1845. It was debated in the convention as a matter of first impression.

[9] Act, Jan. 25, 1840.

[10] Later acts imported other elements of the civil law into the jurisprudence of Texas. We mention here as an example the act of Jan. 16, 1850, on the institution of a stranger as heir by adoption. Cf. *Eckford et ux v. Know* (1886) 67 Tex. 200, 204. It is not within the scope of this article to indicate all the numerous changes in the common law made by constitutional or statutory enactment, such as the abolition of dower, curtesy, primogeniture, estates tail, outlawry, trial by wager of battle, and wager of law, modifications as to the law of libel, etc.

It was of this passage that the supreme court of the Republic said:

> "A hundred judges, in almost any conceivable case, might differ in some degree as to its interpretation and exact function."[11]

They suggested that the district judge try each cause as at law, and "if he cannot succeed in the effort, then ascend the woolsack and chancel it." Other later statutes of the Republic recognized the distinction between actions at law and in equity and added to the perplexity of the courts in their efforts to harmonize the civil and the common-law systems.[12]

This state of confusion called for fundamental treatment and the constitutional convention of 1845 supplied it. Upon the initiative of Hemphill and Rusk, the following provisions were written into the Constitution of Texas[13]:

> "The District Court shall have original jurisdiction . . . . of all suits, complaints and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars exclusive of interest; and the said courts, or the judges thereof, shall have power to issue all writs necessary to enforce their own jurisdiction and give them a general superintendence and control over inferior jurisdictions."[14]

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[11] *Whiting v. Turley* (1842) Dallam (Tex.) 453.

[12] The act of Feb. 5, 1840, to regulate proceedings in civil suits: sec. 2, as to costs "in any cause whether at law or equity."

The act of Feb. 5, 1840, on admission to the bar: sec. 2, admittance "to practice law in all the courts of law and equity."

The act of Jan. 25, 1841, to empower the judges of the district courts to submit issues of fact to a jury "in chancery cases," sec. 7.

The act of Feb. 5, 1841, on limitations: sec. 9, to the effect that "no bill of review shall be granted to any decree pronounced in equity after two years."

The act of Feb. 5, 1841, on sales by "courts of chancery."

These instances bear out Rusk's statement made in the convention of 1845: "Now, sir, the legislature has brought all things into confusion. Immediately after the revolution it was determined that one court should have jurisdiction over all cases, rejecting the useless distinction between law and equity, which has since grown up." *Debates*, p. 274.

[13] Art. IV, sec. 10.

[14] The proposal to create "separate chancery courts" was voted down in the convention. *Journal of the Convention*, p. 191.

As to whether Texas or New York is entitled to the credit of being

Despite this clear-cut abolition of a dual jurisdiction emigrant legislators and judges, steeped in the notions of their early legal training in common-law states and unfamiliar with the civil law, continued, as in the period from 1840 to 1845, to introduce into the jurisprudence of Texas occasional fragments of the common-law system.[15] This tendency disappeared as the indigenous system evolved and bench and bar became better acquainted with it. Apart from the special statutory action of trespass to try title for the recovery of land, it is recognized that there is in Texas but one form of civil action for the enforcement of private rights of whatever nature.

To abolish the common-law forms of action (including the chancery system) and yet retain the common law of England as "the rule of decision" is like trying to remove the motor nerves from a living being and leave the sensory nerves intact. The operation has not been successful in Texas.

Mr. Pomeroy asserts that the adoption of the system of code pleading,

> "has not produced, and was not intended to produce, any alteration of, nor direct effect upon, the primary rights, duties and liabilities of persons, created by either department of the municipal law. . . . The codes do not assume to abolish the distinctions between 'law' and 'equity' regarded as two complementary departments of the municipal law."[16]

The remark is not applicable to Texas. Texas has never been a "code state" nor a "quasi-code state."[17] Its system of pleading arose out of the civil law as truly as did that of Louisiana.[18]

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the first state in the Union to adopt the blended system, see the Report of the Texas Bar Association Committee reproduced in (1896) 30 AM. L. REV. 813. Mr. Sayles' remark (*ibid.*, p. 825) is suggestive: "As Texas never was a common-law state it cannot be said that she was the first to abolish the common-law system of practice, but it is the very highest evidence of the hard common sense of the pioneers of Texas that they retained these admirable features of the civil law."

[15] Cf. *Blumberg v. Mauer* (1873) 37 Tex. 2; *Grassmeyer v. Beeson* (1857) 18 Tex. 753, 766; *New York & Texas Land Company v. Hyland* (1894) 28 S. W. (Tex.) 206, 214.

[16] *Code Remedies* (4th ed.) sec. 8.

[17] So classified by Mr. Hepburn in his valuable article, The Historical Development of Code Pleading in America and England in *Select Essays in Anglo-American Legal History*, Vol. II, p. 672.

[18] John C. Townes, *Pleading in the District and County Courts of Texas* (2d ed.) pp. 84, 85.

Moreover the constitutional abolition of the distinction between law and equity in the administration of justice in the Texas courts is not limited in terms or by right interpretation to the mere abolition of the distinction between legal and equitable procedure.[18] Unfortunately, the opinions of the appellate courts still abound in loose references to "legal" titles and "equitable" titles (though the latter are said to be as "potent" as the former); the statutory action of trespass to try title is declared "essentially a legal action"; the plea of limitation under the statute is denominated a "legal defense," and so on. Over against these we get an occasional trenchant pronouncement like Hemphill's in *Bennett v. Spillars*:[19]

> "If the rules and principles arising from the antagonisms of the common law and equitable jurisdictions were thoroughly extirpated from the mind the provisions of legislation and the decisions and practice of the courts would become more harmonious and more in accordance with our system of judicial procedure."

The English common-law system has been further mutilated in Texas by many statutory enactments and by the adoption of important fractions of a rival system so that its inner harmony is destroyed. Moreover, the Texas courts have not hesitated to declare the rules of the common law inapplicable to our conditions and inconsistent with our usages.[21] Doubts have also recently arisen as to what is meant by the expression "the common law of England" in the Act of 1840 quoted above. In *The Indorsement Cases*,[22] decided in reconstruction days by a supreme court appointed by Major-General Griffin and commanding little respect in Texas, it was held that the law merchant constituted no part of the law of Texas because it was no part of the common law, i. e., the "ante-statute law of England." The Court of Criminal Appeals—the court of last resort in all criminal cases—by a vote

[18] *Hamilton v. Avery* (1857) 20 Tex. 612: "A subsisting equity, by the laws of this state that recognize no distinction between law and equity either in rights or their judicial preservation, confers a right of property by as strong a sanction as that which exists by a right purely legal."

[19] (1852) 7 Tex. 600, 602.

[21] *Stroud v. Springfield* (1866) 28 Tex. 649, 666; *Pace v. Potter* (1893) 85 Tex. 473; *Robertson v. State of Texas* (1911) 63 Ct. Cr. App. (Tex.) 216; *Clarendon Land Co. v. McClelland Bros.* (1893) 86 Tex. 179, 185.

[22] (1869) 31 Tex. 693.

of two to one held in 1911 that Texas has adopted also the English statutes in aid or amendment of the common law, passed before the emigration of our ancestors.[23] In 1913, the Supreme Court of Texas in holding that cohabitation was necessary to constitute a common-law marriage announced that,

> "the common law of England adopted by the Congress of the Republic (of Texas) was that which was declared by the courts of the different states of the United States. . . . . The decisions of the courts of those states determine what rule of the common law of England apply to this case. The effect of the act of 1840 was not to introduce and put into effect the body of the common law, but to make effective the provisions of the common law so far as they are not inconsistent with the conditions and circumstances of our people."[24]

Thus, the English decisions are not controlling as to the common law in Texas. The doctrine of *stare decisis* receives a body blow. A maze of sources is now to be drawn upon. The common law is not uniform throughout the states. Some have adopted the "ancient common law"; others the common law with reference to specific dates, with or without the statutes passed in amendment thereof; others, like Texas, without reference to any date.[25] None have retained it without important modifications.

The upshot of the whole matter is that our complex jurisprudence in Texas has become a storehouse of authorities for any rule the courts deem suited to our peculiar conditions and to the exigencies of any particular case, so as to assure to the litigants substantial justice. The simplicity and flexibility of the Texas system of pleading, and the variety and complexity—not to say confusion—in the sources of our rules of substantive law have had the effect of freeing the Texas courts largely from the restraints of outworn distinctions and rigid classifications and reasonings of the remote past and lifting them into the clearer atmosphere of a living law which is more nearly the reflection of the economic and social ideals of our time. The jurisprudence of Texas to-day is essentially a system of Freirecht. Various factors have operated to make it such. It is a fatal mistake

[23] *Robertson v. State of Texas, supra.*
[24] *Grigsby v. Reib et al.* (1913) 105 Tex. 597.
[25] Cf. (1916) 16 Col. L. Rev. 499, note.

to assume that one can get a correct or comprehensive view of the jurisprudence of a state from the opinions of appellate courts alone.[26]

Early Texas precedents were made under conditions that gave limited opportunity for the examination of even secondary authorities and called for large creative freedom in the courts.[27] Apart from Spanish authorities, Kent and Story, the decisions of the Louisiana courts were most frequently cited. The Louisiana civil code was admired and was freely drawn upon in the enactment of early laws. Its article 21 certainly reflected the viewpoint of the early Texas decisions:

> "In civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

We frequently find such expressions as these:

> "The *moral sense* of what is enjoined by *equity and good conscience* must be exceedingly obtuse to suppose that such flagrant *injustice* would receive the slightest countenance from any judicatory however organized."[28]

And:

> "It appears, then, that the liability of the defendant must result from the *facts of the case*, and not from the averments of the petition. If the possession of the defendant be wrongful, *in the popular acceptation of the term*, if it be inequitable and *unconscientious* . . . . he should *in all events* be responsible for the value of the property."[29]

I think we may safely say that apart from occasional lapses

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[26] Quite recently the writer had the privilege of attending a banquet given in honor of a young lawyer who had just been appointed to the district court bench. Three members of the appellate courts in their addresses urgently advised the young jurist to pay little attention to the refinements of the law, to decide the causes submitted to him upon the broad basis of conscience and his conception of right and wrong, and they assured him he would be seldom reversed.

[27] On Dec. 18, 1837, Messrs. Jack and Kaufman were appointed by the Texas Congress to draft a code of laws, but the Republic had no law books and they made no progress. On Jan. 23, 1839, $1,000.00 was appropriated for books for these commissioners. Whether they got the books or not is not known. They failed to submit a code.

[28] *Hunt v. Turner* (1853) 9 Tex. 385.

[29] *Porter v. Miller* (1852) 7 Tex. 468, 479, opinion by Hemphill.

toward formalism, we have had in Texas from the very beginning a jurisprudence founded upon a "natural law with a variable content."

Besides the variety and richness of the sources of our jurisprudence, and the direction given by early precedents, the personnel of the judiciary has had much to do with the freedom of our jurisprudence from scholastic subtleties and slavish veneration for the ancient landmarks of the law. We certainly cannot complain of any *Weltfremdheit* on the part of our judges. All judicial offices in Texas have generally been elective and for comparatively short terms.[20] During the Republic the supreme court was composed of a chief justice, elected by the joint vote of both houses of Congress, and the several district judges as associate members. The judges of the Texas appellate courts have been drawn chiefly directly from the bar, at which they had achieved such success as brought them into prominence. Taken thus from the body of the people and dependent upon the suffrage of the people for re-election, it is unreasonable to suppose that the judges would consciously seek to bring about any estrangement between the people and the law. Furthermore, the overwhelming majority of the Texas judges, trial and appellate, have lacked and do lack a systematic law school education. Of the present membership of the two highest courts in Texas, not a single man has even attended a law school. After a painstaking search through available published and unpublished biographies, I find that only five of the sixty-six members of the Supreme Court of Texas graduated from a law school of any sort. Court opinions aside, not one has ever published a work of constructive legal scholarship. This is, of course, no reflection on their native ability nor necessarily on their learning. But it will not be held unbecoming in me, I am sure, to say that as a rule the opinions of the appellate courts in Texas do not disclose such an acquaintance with legal history, legal philosophy, and the science of jurisprudence, or such a degree of "discrimination in the use of the expository authorities"[21] as one should expect from schooled jurists. It is vital that only

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[20] The only exceptions occurred in the brief intervals 1845-1850 and 1873-1876 when members of the supreme court were to be appointed by the Governor.

[21] Cf. Dean Wigmore's trenchant criticisms in The Qualities of Current Judicial Decisions (1915) 9 Ill. L. Rev. 529.

men of profound knowledge in legal science should be chosen to administer justice in a system characterized by such elasticity and freedom as ours. The appellate courts of Texas are now turning out about 1,800 published opinions a year—no other state has such an output. We have had—and are still having—a rough, blundering, frontier sort of justice. There has been much talk the past two years of "law reform" in Texas, which means more new and poorly considered legislation. But the heart of our jurisprudence is sound. If the time ever comes when the voices of our law professors will be effectively heard and respected in the forums of justice and the halls of legislation in this country, we may have a more constructive part in preserving the true principles of the law and keeping its evolution in right lines. Meantime, in harmony with or in defiance to "authority," we have the inspiring task of shaping the professional ideals and standards of the next generation of lawyers.

LAW SCHOOL, UNIVERSITY OF TEXAS. GEORGE C. BUTTE.

MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 29, 1987

RE: Direct Action Against Insurer and TEX. R. CIV. P. 38(c)

The general common law rule is that no privity exists between an injured person and the tortfeasor's liability insurer; therefore the injured person has no right of action directly against the insurer and cannot join the insured and the liability insurer as co-defendants. In some states, statutes have been enacted enabling an injured party to proceed directly against the liability insurer. In one state, Florida, the court created a common law right of direct action; however, this common law right was promptly superseded by legislative action. No other state has followed the Florida Supreme Court.

The creation of a right of direct action against an insurer is not simply a matter of repealing the prohibition against joinder, TEX. R. CIV. P. 38(c), although clearly this would be the logical first step. The next impediment is the "no action" clause contained in the contract between insurer and insured. This clause prohibits legal action against the insurer until a judgment against the insured has been rendered. Here is the typical clause:

> LEGAL ACTION AGAINST US
>
> No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Liability Coverage, no legal action may be brought against us until:
>
> 1. We agree in writing that the covered person has an obligation to pay; or
>
> 2. The amount of that obligation has been finally determined by judgment after trial.
>
> No person or organization has any right under this policy to bring us into any action to determine the liability of a covered person.

In Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1935, holding approved), the court concluded that the no-action clause did not violate public policy.

Finally the court must consider what important public policy is furthered by permitting joinder of the insurer and whether it is properly a decision for this court or the legislature. Other states, with the exception of Florida, have deferred to the legislature.

The argument for changing Rule 38(c) is that the insurance companies at present benefit from a double standard, the insurance company may control the defense of its insured, yet cannot be named as a party defendant. In point of fact, the insurance company does not benefit from this perceived "double standard" because as the price for control the insurer is bound by the judgment against its insured.

Even if the court is convinced that under modern practice no prejudice will be injected into the suit by joinder of the insurer, the second reason for non-joinder, relevance, appears to be as valid today as it was 40 years ago. That is, whether an alleged tortfeasor has insurance is wholly irrelevant to any issue in the liability action.

I doubt that much is to be gained by joining insurance companies in liability suits and such joinder may complicate such cases. For example, at present an insurance company may face a real dilemma when it believes that the suit against its insured is excluded from coverage under the policy. If the insurance company rejects coverage and declines to defend, it does so at great risk. It cannot intervene in the liability suit and litigate coverage. See State Farm v. Taylor, ___ S.W.2d ___ (Tex. App. - Fort Worth 1986, writ ref'd n.r.e.) (C-5419). If, however, the insurance company is properly a party in the liability suit, then arguably it could raise and litigate policy defenses in that same suit greatly complicating and protracting such litigation.

Attached to this memo is a memorandum prepared for Judge Robertson on the subject of direct action against insurers. It does a good job of setting out where Texas and the other states are at present on this issue. See also 12A Couch on Insurance Second § 45:784 et seq., and Appleman, 8 Insurance Law & Practice § 4861 et seq.

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

> [I]t is certainly very important to the insurance company that it not be sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party, and for a larger amount, if they know the loss is ultimately to fall on an insurance company.

Id. at 256.

The court in Seaton, 87 S.W.2d at 711, went even further. It said:

> The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the payment of a final judgment that may be rendered against the insured.

Therefore, it seems a "no action" clause may not be necessary to prevent direct action.

Furthermore, there seems to be some statutory basis for arguing that a claimant has no direct action against the insurer, at least in connection with motor carrier liability insurance. See Tex. Rev. Civ. Stat. Ann. art. 911a, § 11 (Vern. 1964) (Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company....); Tex. Rev. Civ. Stat. Ann. art. 911b § 13 (Vern. 1964) (the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier....)

In Grasso v. Cannon Ball Motor Freight Lines, 81 S.W.2d at 484-85, the court emphasized the language "will pay all judgments" in concluding that the statute barred direct action. It said:

> In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a "judgment" against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment.

Id. Moreover, the court held that the legislative history of the statutes demonstrated a "conclusive legislative intent not to allow insurance companies .... to be sued in the same suit with the motor carriers or operators." Id. at 485. See also American

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

Art. 6701h, § 1A establishes mandatory motor vehicle liability coverage. It reads as follows:

> On and after January 1, 1982 no motor vehicle may be operated in this State unless a policy of automobile liability insurance in at least the minimum amounts to provide evidence of financial responsibility under this Act is in effect to insure against potential losses which may arise out of the operation of that vehicle.

Art. 6701h, § 1(10) defines "Proof of Financial Responsibility." It merely sets the amount of coverage needed. Neither it or § 1A contain any language that would seem to prevent direct action. In other words, there is no "shall pay all final judgment" language as there is in art. 911a and art. 911b.

However, the standard automobile liability policy in Texas contains a "no action" clause. Under the current case law, this would probably be an insurmountable barrier to direct action.

C. Compulsory Insurance and Direct Action in Other States

Some states have permitted direct action or joinder where compulsory insurance was involved. See American Southern Insurance Co. v. Dime Taxi Service, 275 Ala. 51, 151 So.2d 783 (1963); Millison v. Dittman, 180 Cal. 443, 181 Pa. 7879 (1919); Addington v. Ohio Southern Exp., Inc., 165 S.E.2d 658 (Ga. App. 1968); Kirtland v. Tri-State Insurance, 556 P.2d 199 (Kan. 1976). Apparently, the pervasive rationale was that required policies are primarily for the benefit of the general public rather than the insured. Other states, including Texas as discussed above, have refused to permit direct action or joinder even in the case of a required policy. See Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Petty v. Lemons, 217 N.C. 492, 8 S.W.2d 616 (1940); Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936). At least one state that authorized direct action under these circumstances has refused to do so when the policy contained a no action clause. Southern Indemnity Co. v. Young, 102 Ga. App. 914, 117 S.E.2d 882 (1961).

D. Direct Action By Judicial Fiat

At one time, Florida had direct action by judicial fiat; however, the legislature overruled the holding of the case by enacting a statute prohibiting direct action. Shepardizing the Florida case reveals that every other jurisdiction faced with the prospects of adopting the Florida court's rationale refused to do so. A major consideration in many of those cases seemed to be that the legislature had overruled the decision.

Even though the case has been legislatively overruled, a

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

It also felt that it is anomalous to deprive the ultimate beneficiary of the proceeds of a policy because the insured failed to satisfy any conditions of payment. It felt by allowing joinder, all of those types of issues would be on the table so the injured party could protect his rights against the insurer. By allowing joinder "the interests of all the parties and the concommittant right to expeditiously litigate the same in concert are preserved." Id. at 720.

E. Direct Action by Statute

Approximately twelve states have enacted some form of direct action statutes. See 12A COUCH ON INSURANCE § 45:797, p. 452, n.18. In accord with general principles relating to the supremacy of statutory provisions over contract provisions, the right to direct action cannot be modified by contract. Malgrem v. Southwestern Automobile Insurance, 201 Cal. 29, 255 P. 512 (1927). In other words, direct action statutes take precedence over "no action" clauses.

Conclusion

While the Florida case establishes some framework for establishing direct action by judicial feat, adopting such rationale in Texas would require overruling a long line of precedents. As Bussey indicates, the idea that keeping the information concerning insurance from the jury may be outmoded, but the Grasso case also rested on the grounds that a "no action" clause did not violate public policy in Texas. As indicated earlier, the fact that the Childress court found that injured parties are third party beneficiaries to the insurance contract is only the beginning. The court must still decide when the injured party can sue. This is where the "no action" clause comes into play. One can argue that it establishes a condition precedent for suit by the third party. This would recognize that the third party has a right to sue but would place some limits on that right.

Getting around art. 911a and 911b would seem to be even more difficult. (These only deal with motor carrier liability.) There has been no change in the language of those statutes since the 1930's. Therefore, one would have to expressly overrule cases construing them.

There seem to be two possible solutions to the problem. The first is legislative action. The second is to get insurance companies to drop the "no action" clause from their policies. If they really believe it is in their best interest to eliminate the intermediary steps as the amicus suggested, it is easily in their hands to remedy the situation.

As a further note, it seems that if this court was to follow the Florida case in respect to direct action, it is entirely

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

SUPPLEMENTAL MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 30, 1987

RE: Direct Action Against Insurer

As we anticipated, the fact that the Insurance Board is the agency directly responsible for the "no action" clause does not lighten the task this court must undertake to undo its effect. In Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970), we said that a rule or order promulgated by an administrative agency acting within its delegated authority is to be considered under the same principles as if it were a legislative act. In Lewis v. Jacksonville Building & Loan Assoc., 540 S.W.2d 307, 311 (Tex. 1976), Judge Denton wrote:

> Valid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation.

Attached are the statutes which delegate to the board the power to prescribe policy forms and endorsements.

State; provided, however, that any insurer may use any form of endorsement appropriate to its plan of operation, provided such endorsement shall be first submitted to and approved by the Board; and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

Acts 1951, 52nd Leg., ch. 491.

For text of article effective January 1, 1982, see art. 5.06, post.

Art. 5.06. Policy Forms and Endorsements

Text of article effective January 1, 1982

(1) In addition to the duty of approving classifications and rates, the Board shall prescribe certificates in lieu of a policy and policy forms for each kind of insurance uniform in all respects except as necessitated by the different plans on which the various kinds of insurers operate, and no insurer shall thereafter use any other form in writing automobile insurance in this State; provided, however, that any insurer may use any form of endorsement appropriate to its plan of operation, provided such endorsement shall be first submitted to and approved by the Board; and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

(2) An insurer, if in compliance with applicable requirements and conditions, may issue and deliver a certificate of insurance as a substitute for the entire policy of insurance. The certificate of insurance shall make reference to and identify the Board prescribed policy or policy form for which the substitution of certificate is made. The certificate shall be in such form as is prescribed by the State Board of Insurance. The certificate will represent the policy of insurance, and when issued, shall be evidence that the certificate holder is insured under such identified policy and policy form prescribed by the Board. The certificate is subject to the same limitations, conditions, coverages, selection of options, and other provisions of the policy as are provided in the policy, and that insurance policy information is to be shown on and adequately referenced by the certificate of insurance issued by the insurer to the insured. Policy forms include endorsements, whether those endorsements are attached initially with the is-

Art. 5.35. Uniform Policies

The Board shall make, promulgate and establish uniform policies of insurance applicable to the various risks of this State, copies of which uniform policies shall be furnished each company now or hereafter doing business in this State. After such uniform policies shall have been established and promulgated and furnished the respective companies doing business in this State, such companies shall, within sixty (60) days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this State after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4888 (Acts 1913, p. 195), without substantive change.

Cross References

Condominium regime, insurance and use of proceeds, see Vernon's Ann.Civ.St. art. 1301a, §§ 19 to 21.

Lloyd's plan, applicability of this article, see art. 18.23.

Policies and applications, see art. 21.35.

Law Review Commentaries

Annual survey of Texas law:

Burden of proof. Harvey L. Davis, 22 Southwestern L.J. (Tex.) 30, 45 (1968).

Fire and casualty insurance. Harvey L. Davis, 23 Southwestern L.J. (Tex.) 130 (1969); Royal H. Brin, Jr., 26 Southwestern L.J. (Tex.) 174 (1972).

Insurance law. Royal H. Brin, Jr., 25 Southwestern L.J. (Tex.) 106 (1971).

Change of ownership within the meaning of the standard fire policy. 8 Baylor L. Rev. 213 (1956).

Fire insurance—community property—"sole ownership" clauses. 13 Southwestern L.J. (Tex.) 373 (1959).

Friendly and hostile fires. 33 Texas L. Rev. 954 (1955).

Recovery for damages caused by sonic boom under the aircraft provision. 12 Baylor L.Rev. 343 (1960).

Texas standard homeowners policy. Larry L. Collaher, 24 Southwestern L.J. (Tex.) 636 (1970).

Library References

Insurance ⇐133(1).

C.J.S. Insurance § 227 et seq.

Appleman, Insurance Law and Practice, §§ 10422, 10423.

Notes of Decisions

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Note 60

60. Attorney's fees

In insured's action seeking to recover upon fire insurance policy for total loss of dwelling and household goods located therein, any error in admitting testimony relating to attorney fees incurred by insured after which trial court refused to submit issues to jury as to such an element of recovery was harmless. Allstate Ins. Co. v. Chance (Civ.App.1979) 582 S.W.2d 530, reversed on other grounds 590 S.W.2d 703.

There is no authority that would authorize recovery for attorney fees in insured's suit upon fire insurance policy. Id.

In absence of statutory authority or contractual provision, attorney fees are not ordinarily recoverable in an action on fire policy. First Preferred Ins. Co. v. Bell (Civ.App.1979) 587 S.W.2d 798, ref. n. r. e.

Article 6.13 which provides that fire policy, in case of total loss by fire of insured property, shall be held and considered to be liquidated demand against insurer for full amount of such policy, but which does not specifically provide for recovery of attorney fees, did not authorize award of attorney fees in action to recover under oral contract for fire insurance. Id.

61. Review

Where Court of Civil Appeals, on appeal from summary judgment for insured in suit on homeowners' policy, determined that loss was within exclusionary clause of policy, judgment was required to be reversed and judgment would be entered that insurer's motion for summary judgment be sustained and that insureds take nothing by their suit. State Farm Fire & Cas. Co. v. Volding (Civ.App.1968) 426 S.W.2d 907, ref. n. r. e.

Where electrical subcontractor found liable to general contractor and parties for whom buildings were being built, for negligent damage to building by fire failed to affirmatively plead contract wherein general contractor assertedly waived its fire insurer's subrogation rights against electrical subcontractor, electrical subcontractor could not contend on appeal that trial court erred in permitting recovery in face of the alleged waiver of subrogation rights. Seamless Floors by Ford, Inc. v. Value Line Homes, Inc. (Civ.App.1969) 438 S.W.2d 598, ref. n. r. e.

Insured's complaint that no evidence existed to support jury finding that insured was contributorily negligent in failing to report, as required by fire policy, value of computer and other equipment on last monthly report before fire destroyed computer and equipment could not be made on appeal inasmuch as trial court never ruled on issue of contributory negligence and insured failed to file motion for new trial assigning "no evidence" issue as point of error. Northern Assur. Co. of America v. Stan-Ann Oil Co., Inc. (Civ.App.1980) 603 S.W.2d 218.

Art. 5.36. Standard Forms

The Board shall prescribe all standard forms, clauses and endorsements used on or in connection with insurance policies. All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the Board. The Board shall have authority in its discretion to change, alter or amend such form or forms of policy or policies, and such clauses and endorsements used in connection therewith, upon giving notice.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4889 (Acts 1913, p. 195), without substantive change.

Cross References

Lloyd's plan, applicability of this article, see art. 18.23.

exclusively in board of insurance commissioners, and rates promulgated by commission are not subject to alteration by agreement, waiver, estoppel or any other device, and insurance carrier agrees to collect, and subscriber agrees to pay, premium rate prescribed by commission, and insurance carrier cannot charge more, nor bind itself to take less, than lawful rate. Id.

Contract to rebate, directly or indirectly, any part of workmen's compensation policy premium as prescribed by state board of insurance commissioners, is illegal and void, and is no defense in suit for full premium. Id.

Where compensation insurance rate is prescribed by one of state's regulatory bodies, it is the only rate parties to contract thereunder can contract for. Id.

Oral agreement under which insured was to be given guaranteed 20 per cent premium discount was invalid, and not available as defense to suit for premiums. Id.

The Board of Insurance Commissioners may not legally approve an insurance company's plan of operation and endorsement as requested and which required that the endorsement be attached to policies for risks of given size or greater than the given size and may not be attached to risks of less than the given size. Op.Atty.Gen.1940, No. 0-2049.

Art. 5.57. Uniform Policy

The Board shall prescribe a uniform policy for workmen's compensation insurance and no company or association shall thereafter use any other form in writing workmen's compensation insurance in this State, provided that any company or association may use any form of endorsement appropriate to its plan of operation, if such endorsement shall be first submitted to and approved by the Board, and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4913 (Acts 1923, p. 408), without substantive change.

Library References

Workers' Compensation ⇐1061.
C.J.S. Workmen's Compensation § 369.

Appleman, Insurance Law and Practice, §§ 10422 to 10424.

Notes of Decisions

1. Construction and application

Oral agreement by insurer to compensate insured for short rate premiums which previous insurer might charge because of cancellation of policy, made in contravention of written policy and accompanied by agreement of insured's president to buy large amount of stock of insurer, particu-

and fixed a rate of $4.36 for boat building not otherwise classified, and employer was engaged in building government boats 110 feet in length, action of commissioners in applying higher rate to employer by limiting application of lower rate to pleasure craft in a particular instance was error and not binding on federal court. Rice v. Continental Cas. Co. (C.C.A.1946) 153 F.2d 964.

The function of the Texas state board of insurance commissioners in applying the proper rate for workmen's compensation to particular risks being purely ministerial, federal district court, in a diversity of citizenship case arising out of such rates, was competent to adjudicate issues arising on application of rate to particular risk. Id.

Art. 5.56. To Prescribe Standard Forms

The Board shall prescribe standard policy forms to be used by all companies or associations writing workmen's compensation insurance in this State. No company or association authorized to write workmen's compensation insurance in this State shall, except as hereinafter provided for, use any classifications of hazards, rates or premium, or policy forms other than those made, established and promulgated and prescribed by the Board.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4908 (Acts 1923, p. 408), without substantive change.

Library References

Workers' Compensation ⇐1061.
C.J.S. Workmen's Compensation § 369.
Appleman, Insurance Law and Practice, §§ 10422 to 10424.

Notes of Decisions

1. Construction and application

Oral agreement by insurer to compensate insured for short rate premiums which previous insurer might charge because of cancellation of policy, made in contravention of written policy and accompanied by agreement of insured's president to buy large amount of stock of insurer, particularly where daughter of insured's president was insurer's agent, was invalid and unenforceable. Continental Fire & Cas. Ins. Corp. v. American Mfg. Co. (Civ.App.1949) 221 S.W.2d 1006, error refused.

Establishment of premium rates for workmen's compensation insurance is exclusively vested in Board of Insurance Commissioners and rates promulgated by Board are not subject to alteration by agreement, estoppel, waiver or otherwise. Traders & Gen. Ins. Co. v. Frozen Food Exp. (Civ.App.1953) 255 S.W.2d 378, ref. n. r. e.

The uniform policy requirements of the Insurance Code were not intended to prevent promulgation of different policy forms to fit different types of coverage or risk assumption by a compensation insurance carrier, and did not preclude use of different policy form for employers choosing between retrospective plan of premium computation and guaranteed cost discount plan, since all that law requires is that policies within each class be uniform. Associated Indem. Corp. v. Oil Well Drilling Co. (Civ.App.1953) 258 S.W.2d 523, affirmed 153 T. 153, 264 S.W.2d 697.

Intent of this article and arts. 5.55, 5.57 and 5.60, is to remove premiums on workmen's compensation policies from field of bargaining. Associated Emp. Lloyds v. Dillingham (Civ.App.1954) 262 S.W.2d 544, error refused.

Establishment of premium rates for workmen's compensation policies is vested

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

> [I]t is certainly very important to the insurance company that it not be sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party, and for a larger amount, if they know the loss is ultimately to fall on an insurance company.

Id. at 256.

The court in Seaton, 87 S.W.2d at 711, went even further. It said:

> The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the payment of a final judgment that may be rendered against the insured.

Therefore, it seems a "no action" clause may not be necessary to prevent direct action.

Furthermore, there seems to be some statutory basis for arguing that a claimant has no direct action against the insurer, at least in connection with motor carrier liability insurance. See Tex. Rev. Civ. Stat. Ann. art. 911a, § 11 (Vern. 1964) (Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company....); Tex. Rev. Civ. Stat. Ann. art. 911b § 13 (Vern. 1964) (the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier....)

In Grasso v. Cannon Ball Motor Freight Lines, 81 S.W.2d at 484-85, the court emphasized the language "will pay all judgments" in concluding that the statute barred direct action. It said:

> In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a "judgment" against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment.

Id. Moreover, the court held that the legislative history of the statutes demonstrated a "conclusive legislative intent not to allow insurance companies ... to be sued in the same suit with the motor carriers or operators." Id. at 485. See also American

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

Art. 6701h, § 1A establishes mandatory motor vehicle liability coverage. It reads as follows:

> On and after January 1, 1982 no motor vehicle may be operated in this State unless a policy of automobile liability insurance in at least the minimum amounts to provide evidence of financial responsibility under this Act is in effect to insure against potential losses which may arise out of the operation of that vehicle.

Art. 6701h, § 1(10) defines "Proof of Financial Responsibility." It merely sets the amount of coverage needed. Neither it or § 1A contain any language that would seem to prevent direct action. In other words, there is no "shall pay all final judgment" language as there is in art. 911a and art. 911b.

However, the standard automobile liability policy in Texas contains a "no action" clause. Under the current case law, this would probably be an insurmountable barrier to direct action.

C. Compulsory Insurance and Direct Action in Other States

Some states have permitted direct action or joinder where compulsory insurance was involved. See American Southern Insurance Co. v. Dime Taxi Service, 275 Ala. 51, 151 So.2d 783 (1963); Millison v. Dittman, 180 Cal. 443, 181 Pa. 7879 (1919); Addington v. Ohio Southern Exp., Inc., 165 S.E.2d 658 (Ga. App. 1968); Kirtland v. Tri-State Insurance, 556 P.2d 199 (Kan. 1976). Apparently, the pervasive rationale was that required policies are primarily for the benefit of the general public rather than the insured. Other states, including Texas as discussed above, have refused to permit direct action or joinder even in the case of a required policy. See Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Petty v. Lemons, 217 N.C. 492, 8 S.W.2d 616 (1940); Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936). At least one state that authorized direct action under these circumstances has refused to do so when the policy contained a no action clause. Southern Indemnity Co. v. Young, 102 Ga. App. 914, 117 S.E.2d 882 (1961).

D. Direct Action By Judicial Fiat

At one time, Florida had direct action by judicial fiat; however, the legislature overruled the holding of the case by enacting a statute prohibiting direct action. Shepardizing the Florida case reveals that every other jurisdiction faced with the prospects of adopting the Florida court's rationale refused to do so. A major consideration in many of those cases seemed to be that the legislature had overruled the decision.

Even though the case has been legislatively overruled, a

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

It also felt that it is anomalous to deprive the ultimate beneficiary of the proceeds of a policy because the insured failed to satisfy any conditions of payment. It felt by allowing joinder, all of those types of issues would be on the table so the injured party could protect his rights against the insurer. By allowing joinder "the interests of all the parties and the concommittant right to expeditiously litigate the same in concert are preserved." Id. at 720.

E. Direct Action by Statute

Approximately twelve states have enacted some form of direct action statutes. See 12A COUCH ON INSURANCE § 45:797, p. 452, n.18. In accord with general principles relating to the supremacy of statutory provisions over contract provisions, the right to direct action cannot be modified by contract. Malgrem v. Southwestern Automobile Insurance, 201 Cal. 29, 255 P. 512 (1927). In other words, direct action statutes take precedence over "no action" clauses.

Conclusion

While the Florida case establishes some framework for establishing direct action by judicial feat, adopting such rationale in Texas would require overruling a long line of precedents. As Bussey indicates, the idea that keeping the information concerning insurance from the jury may be outmoded, but the Grasso case also rested on the grounds that a "no action" clause did not violate public policy in Texas. As indicated earlier, the fact that the Childress court found that injured parties are third party beneficiaries to the insurance contract is only the beginning. The court must still decide when the injured party can sue. This is where the "no action" clause comes into play. One can argue that it establishes a condition precedent for suit by the third party. This would recognize that the third party has a right to sue but would place some limits on that right.

Getting around art. 911a and 911b would seem to be even more difficult. (These only deal with motor carrier liability.) There has been no change in the language of those statutes since the 1930's. Therefore, one would have to expressly overrule cases construing them.

There seem to be two possible solutions to the problem. The first is legislative action. The second is to get insurance companies to drop the "no action" clause from their policies. If they really believe it is in their best interest to eliminate the intermediary steps as the amicus suggested, it is easily in their hands to remedy the situation.

As a further note, it seems that if this court was to follow the Florida case in respect to direct action, it is entirely

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

C-5027

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

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October 23, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248
Capitol Station
Austin, Texas 78767

Dear Justice Wallace:

At the request of Broadus Spivey made at the SCAC session of June 27, 1987, I appointed a Special Subcommittee to study TRCP 38(c) and 51 (b) which deal with the same subject, i.e. "direct actions." That committee consists of Frank Branson, Franklin Jones, and Broadus Spivey, who are to work with Sam Sparks (El Paso) who is the Standing Subcommittee Chair for Rules 15-166a.

The work of this subcommittee on these rules will likely be one of the leading studies for the proposed rules admendments to be effective January 1, 1990. By copy of this letter, I am requesting that Doak Bishop, Chairman of the COAJ for the ensuing year, set up a similar special subcommittee to investigate these rules to determine whether today in Texas direct actions should be permissible under the Rules of Civil Procedure.

I hope this sufficiently responds to your inquiry.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
xc: Mr. Doak Bishop
Chairman COAJ

Mr. Frank Branson
Mr. Franklin Jones
Mr. Broadus Spivey

00545

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August 7, 1987

TO ALL SUPREME COURT ADVISORY COMMITTEE MEMBERS:

The Chairman of the Special Subcommittee to Study Texas Rule of Civil Procedure 51(b) and its companion rules is Sam Sparks (El Paso). The members of that subcommittee are:

Frank Branson
Franklin Jones
Broadus Spivey

This Special Subcommittee is to:

(1) thoroughly study the issues;

(2) draft proposed rules and rule amendments whether or not the Subcommittee recommends their adoption;

(3) make a full report at our next scheduled meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure

00546

SPECIAL SUBCOMMITTEE TO STUDY RULE 51(b)
AND ITS COMPANION RULES

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Grambling and Mounce
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Spivey, Kelly & Knisely
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Austin, Texas 78768-2011
(512) 474-6061

Special Subcommittee Rule 51

natural person." Okay. Thank you.

Now, what do we do to 614? And one reason I couldn't follow you with looking at page 358 is because that's the page in the rule book. I was looking at 358 but a different page.

PROFESSOR BLAKELY: You probably don't have it in --

CHAIRMAN SOULES: The same place.

PROFESSOR BLAKELY: But the same thing.

CHAIRMAN SOULES: The same thing, okay.

(Off the record discussion ensued.

CHAIRMAN SOULES: Okay. What's next?

MR. SPIVEY: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: We're fixing to lose some people. And I'd like to move the chair to appoint a special subcommittee to study Rule 51(b), which that provision says this rule shall not be applied in tort cases so as to -- this is the parties rule. "This rule shall not be applied in tort cases so as to permit the joinder of a liability

insurance company unless such company is by statute or contract directly liable to the person injured or damaged."

CHAIRMAN SOULES: Okay. That is assigned to -- as of this time -- as of this moment, that is assigned to the standing subcommittee that embraces those rules. And if anyone wants to work with them -- let's see, who's the chair of that? The chairman of that is Sam Sparks, El Paso, and if you want to work with him, write him. And Tina will get out a letter that that is being assigned to him for study within his standing subcommittee.

MR. SPIVEY: Okay, thank you.

PROFESSOR DORSANEO: Mr. Chairman, there are a number of other rules that are companions to 51(b) that contain that same concept, and they all need to be examined together.

MR. BRANSON: Mr. Chairman, I would urge that's a large enough problem -- Chairman Sparks has his hands full with all those rules and would urge the chair to appoint a subcommittee directed specifically to that problem.

MR. SPIVEY: That is sort of a special

problem. And I don't think it's going to divide the plaintiffs and the defense lawyers as much as it's going to be a controversial matter.

CHAIRMAN SOULES: That's fine. Broadus, do you have a standing subcommittee? I don't know what your current assignments are. Let me look and see here. You had a special subcommittee to handle that.

PROFESSOR EDGAR: Well, Sam ought to be on it.

CHAIRMAN SOULES: What I'd like to do is keep the first assignment within the standing subcommittee for overall control. And, of course, anyone can generate work -- you know, work product for Sam and feed that, and if it gets to be -- in other words, let him decide whether it needs a special subcommittee. I'm not trying to be argumentative with you, Frank, but I am trying to keep as much organization. Even the COAJ now knows who on their committee keys to what rule numbers. So, they can consult with --

MR. BRANSON: Well, my only concern is this is a rule that I would urge probably is going to require some study and a pretty extensive report. And with all deference to Sam, he's in El

Paso and there's one airplane on Saturday that goes to El Paso. If you could --

CHAIRMAN SOULES: For purposes of this rule, I appoint Frank Branson, Franklin Jones and Broadus Spivey as special members of that subcommittee and ask them to take the initiative with Sam to get him the work product that they want considered by that committee.

MR. JONES: Can I make a comment, Mr. Chairman, which I think might let the chair know where we're coming from?

CHAIRMAN SOULES: Yes, sir.

MR. JONES: I don't know about Broadus or Frank, but I've had four members of the Court tell me that they wanted the committee to look at this rule, and that's where we're coming from on this.

CHAIRMAN SOULES: Okay. Well, it's going to be looked at now. And the three of you-all are special members of Sam's subcommittee to take the initiative to get to his subcommittee what you want him to look at. And if he wants some of you-all to handle the report, you know, he's got that prerogative and you-all certainly can ask him. And he may want you to specially

handle that particular part of his report next time.

Okay. We've still got a lot of rules to work through, so let's go on with our agenda. We've got Rusty McMains, Tony Sadberry, Steve McConnico and Professor Carlson. Now, since Steve and Elaine are both Austin residents and Tony and Rusty are going to have to travel, I would propose that we take the two out-of-towners first in case they must go. Is that okay with you Elaine and Steve?

PROFESSOR CARLSON: Yes.

MR. McCONNICO: Yes.

CHAIRMAN SOULES: Rusty, between you and Tony, flip a coin or discuss who wants to go first. What are your travel schedules?

MR. SADBERRY: I'm driving, Luke. And mine is probably not --

CHAIRMAN SOULES: Tony, go ahead.

MR. SADBERRY: Okay.

CHAIRMAN SOULES: While Tony is tuning up, I've got a repealer in here of 164 which we failed to do last time after we combined 164 into 162. So, all in favor of that, say "I." Okay.

MR. SADBERRY: Okay. Mr. Chairman,

HJH -
SC AA Sec C
+ agenda

Insurance Comm has a regulation?

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

March 3, 1988

To: Members of the Planning Subcommittee of the
State Bar Committee on the Administration of Justice

Re: Direct Actions

Although I anticipated a maelstrom of letters from lawyers and academics in response to my inquiry it has not developed. Enclosed are copies of all of the written responses I received to some 20 letters. I will summarize the 2 telephone calls (one from Phil Hardberger) as follows: "It would be a good idea and would stop deceiving the jury; but it would also end the new breach of the duty of good faith cause of action which may be a better remedy. The Supremes cannot do this by rule changes."

I think you will find Prof. John Sutton's letter to be the most intriguing. He approaches this from a different angle entirely.

Given Judge Kilgarlin's concurrence in Cont'l Casualty v. Huizar, we may wish to recommend that no effort be made to allow direct actions through a rules change, but that study of the ethics issue raised by John Sutton should be pursued instead. Please let know your reaction to this, before the March 12 meeting if possible.

I would also like to hear from those of you who are working on separate projects (work product; pleadings; findings and conclusions), so that either you or I can give a short report at the meeting.

Very truly yours,

Michael D. Schattman

MDS/lw

00553

xc: Doak Dishop
encl.

GLEN WILKERSON
ATTORNEY AT LAW
1680 ONE AMERICAN CENTER
600 CONGRESS AVENUE
AUSTIN, TEXAS 78701

December 7, 1987

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TEXAS BOARD OF
LEGAL SPECIALIZATION

AREA CODE 512
TELEPHONE 478-6491

Judge Michael Schattman
348th District Court
Tarrant County Court House
Fort Worth, Texas 76196-0281

Dear Mike:

It was good to hear from you even if it was a "judicial inquiry." I have heard many good things from a lot of people about the strong public service you are giving the citizens of Tarrant County. As an old Fort Worth boy (getting older), I can say that they need it.

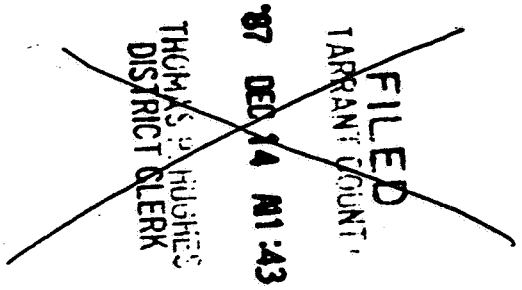
As to the subject of your inquiry, I believe that it would be a mistake to change the rules on this point to permit direct actions. My primary objection after some 15 years on both sides of the docket (plaintiff and defendant) is that (1) there is really no overpowering need to change the present law; (2) if there is a "need," it is a need primarily driven by the "need" for higher verdicts; (3) the result will be a complicating overlay of new rules, new procedures which will literally take years to sort out whatever benefits flow from the change are outweighed by the costs.

Thank you for writing.

Respectfully,

Glen Wilkerson

GW/ll



00554

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705 · (512) 471-5151

December 14, 1987

Judge Michael D. Schattman
348th Judicial District of Texas
Tarrant County Courthouse
Fort Worth, Texas 76196-0281

Re: Direct Actions Against Insurers

Dear Judge Shattman:

I have two or three reactions to the problems raised in your letter of November 30.

At the outset, it seems to me that cases such as the very recent Supreme Court case of Continental Casualty Co. v. Huizar (decided November 25, 1987) forcefully suggest that direct actions should be allowed against insurance companies, and normally this would be a joinder of the insured and insurer as defendants.

My main reason for favoring direct actions, however, is that the lawyers hired by insurance companies to represent insureds when damage suits are filed against the insureds are placed in very difficult positions, from a standpoint of professional ethics. Therefore, a change to direct actions should also include a change in the liability policies, taking away from the insurance companies the duty and right to defend the case and substituting a duty and right to employ counsel for the insured with such counsel thereafter to be solely responsible to the insured and with no obligations whatever to the insurer.

My third reaction is that the Supreme Court does not have authority to make this needed change. Legislation would be required, in my opinion.

With best wishes,

Sincerely yours,

John F. Sutton, Jr.
A.W. Walker, Jr. Centennial
Chair in Law

JFS/cva

Jenkens & Gilchrist
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3850 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-2909
(713) 227-2700

December 21, 1987

Don M. Dean, Esq.
Underwood, Wilson, Berry,
Stein & Johnson
P.O. Box 9158
Amarillo, TX 79105

Dear Don:

Attached you will find a letter I received from Judge Michael Schattman, 348th District Court, of Fort Worth, who is chairing the State Bar's subcommittee investigating whether "direct actions" against insurance carriers are preferable or not.

Because your practice is probably more insurance-oriented than my own and because I respect your insights and points of view, if you have some knowledge and interest in the subject you might take a few minutes to give Judge Schattman the benefit of your thoughts on this subject.

I would appreciate the favor of a copy of any correspondence you generate, so that I can also educate myself.

I hope this letter finds you in good health and enjoying the holidays.

Kindest personal regards.

Sincerely,

Ric

T. Richard Handler

TRH:cb
Enclosure
cc: The Honorable Michael D. Schattman

00556

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

November 30, 1987

Richard Handler
Jenkens & Gilchrist
3200 Allied Bank Tower
Dallas, Texas 75202-2711

Re: Direct Actions Against Insurers

Dear Ric:

There are two study groups presently investigating whether to authorize "direct actions" under the Rules of Civil Procedure. One group is a subcommittee of the Supreme Court's Rules Advisory Committee chaired by Broadus Spivey of Austin. The other is a subcommittee of the State Bar's Committee on the Administration of Justice. I am the chair of the State Bar's subcommittee and I am writing to you and other lawyers around the state to get your thoughts and advice on this issue.

Would you mind, after kicking this around with friends and colleagues, writing me a letter on your (and their) perceptions of the pros and cons of such a change in Texas practice? This would change both the approach and philosophy of Texas tort litigation. Is this wise? Would counter-claims also be direct actions? Would we now reveal the existence or absence of all parties' liability insurance? Should direct actions be limited only to situations where coverage and/or defense is denied? Will a rules change be sufficient -- given the authority over policy language granted to the State Board of Insurance by statute, does the Supreme Court even have this authority?

I truly appreciate your taking the time to respond and give us your help on exploring this issue. Thank you.

Very truly yours,

Michael D. Schattman

00557

MDS/lw
xc

Jenkens & Gilchrist
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December 21, 1987

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Terry Tottenham, Esq.
One American Center
600 Congress Avenue
Austin, TX 78701

Forrest Bowers, Esq.
1401 Texas Avenue
Lubbock, TX 79048

Gentlemen:

Attached you will find a letter I received from Judge Michael Schattman, 348th District Court, of Fort Worth, who is chairing the State Bar's subcommittee investigating whether "direct actions" against insurance carriers are preferable or not.

Because your practices are probably more insurance-oriented than my own, because of your current positions in the Litigation Section, and because I respect your insights and points of view, each of you who has some knowledge and interest in the subject might take a few minutes to give Judge Schattman the benefit of your thoughts on this subject.

I would appreciate the favor of a copy of any correspondence you generate, so that I can also educate myself.

I hope this letter finds each of you in good health and enjoying the holidays.

Kindest personal regards.

Sincerely,

T. Richard Handler

TRH:cb
Enclosure
cc: The Honorable Michael D. Schattman

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PLEASE REPLY TO:
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TOMMY JACKS
Board Certified
Civil Trial Law
Personal Injury Trial Law
Texas Board of Legal Specialization

MARK L. PERLMUTTER
Board Certified
Civil Trial Law
Texas Board of Legal Specialization

JAMES D. MARSTON

December 23, 1987

Hon. Michael D. Schattman
348th Judicial District Court
Tarrant County Courthouse
Fort Worth, TX 76196-0281

Dear Mike:

Thank you for your letter of November 30, 1987, which arrived while, coincidentally, I was in your hometown engaged in settlement negotiations in a construction accident case in which, as I recall, you presided over an early hearing regarding the scheduling of certain defense witness depositions. The case settled just before the December 7 trial date for a little over two million dollars, I am happy to report.

I know that that has nothing to do with the matter you wrote me about, but you know we plaintiff's lawyers can't resist a little gratuitous bragging every now and then.

I appreciate your soliciting my opinion about the issue of direct actions against insurers. I believe that there is a divergence of opinion amongst members of the plaintiffs' trial bar on this issue. As you might expect, there is one school of thought that direct action against insurers is just what the doctor ordered. For my part, however, I question the wisdom of this and certain other "reform" proposals being discussed presently. I do not applaud the movement toward telling the jury all there is to know about the background of a lawsuit, because I believe that distracts them from the true issues of the case. (For the same reason, I object to a "cure" general charge and to the notion that it's okay to tell the jury the effect of their answers). I recognize that in some cases it would be to my benefit to be able to sue insurers directly and to tell jurors what they're up to, but in other cases it cuts the other way, and in few cases does the jury really need to know all those things in order to get about their business.

I may be getting conservative in my old age, but I generally subscribe to the "don't fix it if it ain't broke" school of legal reform. It ain't broke.

Thanks again for soliciting my views. If I can think of any case in which direct action against insurers should be permitted, it is in the case where a claim for breach of duty of good faith and fair dealing is combined with the liability suit giving rise to that claim (e.g., in the third-party liability situation where the insurer has denied or delayed the fair settlement of the claim or has engaged in other abusive settlement practices.

Please feel free to call me at any time.

Cordially yours,

Tommy Jacks

TJ/cmak

McGUIRE
&
LEVY

ATTORNEYS AND COUNSELORS AT LAW

LONNIE C. McGUIRE, JR.
ALBERT LEVY
KIP A. PETROFF
MIKE CHAMBERS

MacArthur Plaza, Suite 650
5525 MacArthur Boulevard
Post Office Box 165507
Irving, Texas 75016-5507
214/580-1777
Metro 751-1120

January 14, 1988

Hon. Michael D. Schattman
District Judge
348th Judicial District
Tarrant County Courthouse
Fort Worth, TX 76196-0281

RE: Direct Actions Against Insurers

Dear Judge Schattman:

When I received your correspondence of November 30, 1987, I really didn't know enough about direct action statutes to give you an intelligent appraisal. I wrote to Jerry Kwilosz, a former claim manager and presently a lawyer for Reliance Insurance Company, and asked him if he would be kind enough to share his observations and experience with us concerning Reliance's Louisiana experience.

I enclose a copy of his correspondence to me dated January 11, 1988. If you have any further questions, please feel free to contact Jerry directly as I know he'll be delighted to share his experiences of the past 25 years with you.

If there's any way we can be of service to you at any time, please feel free to call upon us.

Sincerely,

McGUIRE & LEVY

Lonnie C. McGuire, Jr.

LCM:vb
Enc.

cc Jerry Kwilosz

Reliance

JANUARY 11, 1988

JAN 14 1987

LONNIE C. MC GUIRE, JR.
MC GUIRE & LEVY
ATTORNEYS AND COUNSELORS AT LAW
P. O. BOX 165507
IRVING, TEXAS 75016-5507

RE: DIRECT ACTIONS AGAINST INSURERS

DEAR LONNIE:

I HAVE YOURS OF DECEMBER 30, 1987, ALONG WITH THE NOVEMBER 30TH LETTER OF DISTRICT JUDGE MICHAEL D. SCHATTMAN REGARDING THE ABOVE CAPTIONED SUBJECT. JUDGE SCHATTMAN'S LETTER INDICATES THAT THERE ARE TWO BAR STUDY GROUPS INVESTIGATING "DIRECT ACTIONS" AGAINST INSURANCE CARRIERS. WITHOUT FURTHER INFORMATION, I ASSUME THE CONTEMPLATED PROCEDURE WOULD BE MUCH LIKE THE SITUATION AS IT EXISTS IN LOUISIANA. THERE, IN THE USUAL CASE, PLAINTIFF SUES A DEFENDANT AND USF&G, HIS INSURANCE CARRIER. THESE ARE THE NAMED DEFENDANTS IN A LAW SUIT. THE PLEADINGS USUALLY STATE THAT THE DEFENDANT IS USF&G, INSURED, AND THAT THE INSURANCE COMPANY IS RESPONSIBLE IN PAYMENT FOR WHATEVER NEGLIGENT ACTIVITIES THE DEFENDANT MIGHT BE FOUND RESPONSIBLE FOR.

I HAVE BEEN INVOLVED IN MUCH OF THIS TYPE OF LITIGATION AND I HAVE NOT FELT THAT THE CARRIER'S PRESENCE MAKES THE CASE WORSE, SO TO SPEAK, FROM THE DEFENSE STANDPOINT. CURRENT JURY PANELS ARE NOT SO NAIVE AS TO BE UNAWARE THAT THERE IS INSURANCE COVERAGE PRESENT IN MOST ALL OF THE LITIGATION WE SEE PRESENTLY.

THERE ARE ADVANTAGES TO BOTH SIDES WHERE THE CIVIL PROCEDURE ALLOWS SUCH DIRECT ACTIONS. ONE IMPORTANT ONE WOULD BE THE ABILITY TO HAVE EVIDENCE INTRODUCED ON COVERAGE WHERE THIS ISSUE IS IN THE CASE. IN THE USUAL SITUATION IN LOUISIANA WHERE THERE IS SOME COVERAGE PROBLEM AND THE CARRIER IS DIRECTLY NAMED IN THE ACTION ALONG WITH ITS INSUREDS, THE CARRIER'S ANSWER USUALLY ADDRESSES ITSELF TO THE COVERAGE ISSUE, TO SET UP THE COVERAGE DEFENSE. THIS ORDINARILY IS DONE, OF COURSE, BY A DIFFERENT LAWYER REPRESENTING THE INSURANCE COMPANY ONLY. THIS SITUATION CURRENTLY PRESENTS A PROBLEM IN TEXAS WHERE THE DUTY TO DEFEND

Reliance Insurance Company
1320 Greenway Drive, Irving, Texas 75038
Mailing Address: P.O. Box 660621, Dallas, Texas 75266-0621
Telephone: (214) 550-0068

00503

IS PROBABLY THE ONLY THING THAT CAN BE ADDRESSED IN THE LAW SUIT IN CHIEF.

ANOTHER ADVANTAGE WOULD BE IN HAVING THE EXISTENCE OR ABSENCE OF LIABILITY INSURANCE FOR ALL PARTIES TO BE A MATTER OF RECORD. IN LOUISIANA, FOR INSTANCE, THE PARTIES SUBMIT THE CERTIFIED COPIES OF ALL COVERAGE AND THIS BECOMES PART OF THE RECORD FOR EVERYONE TO KNOW.

I WOULD NOT BE IN FAVOR OF DIRECT ACTIONS ONLY IN COVERAGE MATTERS. I WOULD PREFER THAT THE DIRECT ACTION PROCEDURE APPLY IN ALL LITIGATION. I THINK TO LIMIT IT TO COVERAGE MATTERS WOULD BE MUCH TOO CUMBERSOME.

I COULD SEE WHERE SOME CARRIERS WOULD BE PRETTY MUCH AGAINST THIS CHANGE IN THE CIVIL PROCEDURE IN THAT THEY MIGHT FEEL THAT BECAUSE OF WHO THEY ARE THAT THEY COULD BE A TARGET, THAT JURIES WOULD BE MUCH MORE PRONE TO RULE ON THIS EMOTION THAN ON THE FACTS OF THE CASE. I THINK THIS WOULD BE LIMITED TO CARRIERS OF SUBSTANTIAL NATIONAL STATURE - ALLSTATE, STATE FARM.

I HOPE THE ABOVE CAN HELP YOU IN YOUR REPLY TO JUDGE SCHATTMAN. IF YOU HAVE ANY QUESTIONS, GIVE ME A CALL.

BEST REGARDS.

JERRY KWILOSZ

JJK:AK

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SUSAN C. SHANK
LUTHER H. SOULES III
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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 11, 1988

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Re: Direct Actions Against Insurers

Dear Sam:

I have enclosed a copy of a letter sent to me from Michael D. Shattman regarding direct actions against insurers. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

00505

LHS

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
PHONE (817) 877-2715

November 30, 1987

Doak Bishop
Hughes & Luce
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Re: Direct Actions Against Insurers
and Rules 38(c) and 51(b), T.R.C.P.

Dear Doak:

I received your note of the 19th with memos and correspondence today. An incorrect zip code and the vagaries of the county's in-house mail service are the culprits.

The memo from Eddie Molter to Judge Robertson of October 30, 1986, is incomplete. I received pages 1, 3, 5 and 7. What about the others? Is the Chuck Lord memo to Judge Wallace only a single page? Can you help on this? Can Broadus?

I am sending a letter out to some selected practitioners and academics soliciting their views. It would seem from the memos that a rule change alone would not be enough to usher in direct actions. This would be such a big change in our practice it should be approached cautiously.

I am copying Broadus Spivey, Luke Soules and the members of the COAJ "think tank" subcommittee. I would like to send my fellow think tankers copies of the complete memos. I will send you, Broadus and Luke copies of anything my letter generates.

Very truly yours,

Michael D. Schattman

00566

MDS/lw

xc: B. Spivey, L. Soules, Mike Handy, Bill Dorsaneo, Pat Hazel, Charles Tighe

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ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 9, 1987

Mr. Sam Sparks
Grambling and Mounce
P. O. Drawer 1977
El Paso, Texas 79950-1977

Re: Tex. R. Civ. P. 38(c) and 51(b)

Dear Sam:

I have enclosed a letter sent to me through Michael D. Schattman regarding Rules 38(c) and 51(b). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHS/hjh
SCACII:003
Enclosure
cc: Justice James P. Wallace
Mr. Michael D. Schattman

00567

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A PROFESSIONAL CORPORATION
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INVESTIGATORS†
JOHN C. LUDLUM
RICK LEEPER

BUSINESS MANAGER:
MELVALYN TOUNGATE

November 9, 1987

BAS87.266

Hon. Sam Sparks
Grambling and Mounce
Texas Commerce Building
P. O. Drawer 1977
El Paso, Texas 79950-1977

Re: Special Subcommittee - TRCP 38(c) and 51(b)
Direct Actions

Dear Chairman Sam:

Since I have really dropped the ball on this assignment, I need to call upon you for help in restoring my appearance of reliability.

On June 27, 1987, Luke Soules appointed a special subcommittee to study these rules. The subcommittee consists of you as chairman, Frank Branson, Franklin Jones, and myself as members.

I inquired of Justice Wallace as to the existence of any briefing or information that had accumulated with the Supreme Court over a period of years. This has been a rather lively topic of discussion in the legal community ever since I have been practicing, and I knew the Supreme Court had to have some material gathered. On July 8, 1987 Judge Wallace forwarded to me copies of research done on the subject. Like a good committee member, I procrastinated "until tomorrow." Now, "manaña" has come.

I am forwarding a copy of the material furnished to me by Judge Wallace and a copy of his accompanying letter of July 8, 1987.

We need to get together, and that should be without further delay. It will make you look good to act in a rather hasty fashion while you can compare your conduct with my speed.

Additionally, I have received several inquiries from lawyers who are not even members of our committee and some from defense lawyers, too, asking when we were going to move on this issue. There is more interest than I had thought. I would suggest a Thursday or Friday meeting in Austin within the next three or four weeks.

I apologize to you, Luke Soules, and especially to Judge Wallace, for my inertia.

Sincerely,

Broadus A. Spivey

BAS:jk

c: Hon. James P. Wallace
Mr. Luther H. Soules III
Mr. Frank Branson
Mr. Franklin Jones
Mr. Doak Bishop, Chairman, COAJ

6202

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 8, 1987

87 JUL 10 A9:51

Mr. Broadus A. Spivey
Spivey, Grigg, Kelly & Knisely
P. O. Box 2011
Austin, Texas 78768

Dear Broadus:

As per your request of last week, I am forwarding copies of research done by various court personnel into direct action against insurance companies in Texas. I hope this is of some help to you and I look forward to your subcommittee report to the Supreme Court Advisory Committee.

Sincerely,

James P. Wallace
Justice

JPW/cw

00570

26 YALE L. J. 699 (1917) Direct Action

EARLY DEVELOPMENT OF LAW AND EQUITY IN TEXAS

Burke in his *Tract on the Popery Laws* used the famous dictum:

> "There are two, and only two, foundations of law, equity and utility."

In the Texas constitutional convention of 1845, Thomas J. Rusk, the President of the Convention, paraphrased Burke's dictum and a text he had learned from Blackstone, in these words:

> "When cases are to be decided, the eternal principles of right and wrong are to be first considered, and the next object is to give general satisfaction in the community."[1]

He was advocating the employment of juries in equity cases. He urged that juries were better acquainted with the neighborhood and local conditions and circumstances than a chancellor and were generally as competent in suits in equity as in cases at law.

> "And if twelve men determine against a man he does not go away abusing the organs of the law; he comes to the conclusion that he is in the wrong."

The proposed jury "innovation"—for it was an innovation in American jurisprudence—was not adopted without strong opposition, led by Chief Justice John Hemphill, who was Chairman of the Committee on Judiciary. In the course of his address on the subject, Judge Hemphill said:

> "I cannot say that I am very much in favor of either chancery or the common-law system. I should much have preferred the civil law to have continued here in force for years to come. But inasmuch as the chancery system, together with the common law, has been saddled upon us, the question is now whether we shall keep up the chancery system or blend them together. If we intend to keep it up as it is known to the courts of England, of the United States, and of many of the states, we should oppose this

[1] *Debates of the Texas Convention*, Sess. July 28, 1845, Wm. F. Weeks, reporter, published by the authority of the convention (Houston, 1845) p. 274.

population estimated at 20,000), the ox-cart was the usual means of transportation, Indian raids and Mexican incursions kept all the men virtually under arms, and the population were put to it to produce enough from the soil to keep alive. The simple fact is the early Texans neither gave nor could give any discriminating thought to their system of private law. This question was overshadowed by the greater public questions of the maintenance of independence, of annexation to the United States, of public land grants, and slavery. Besides, after their experience with Mexican cruelty and treachery, they had a natural suspicion of everything Mexican. Little wonder then that they abruptly rejected a system of law which was contained in a strange language and adopted a system with which they were familiar and the records of which were written in their own tongue. Had the local conditions been different then, it is possible Texas like Louisiana, could have been cited by Dr. Hannis Taylor as a striking corroboration of his thesis that,

> "out of this fusion of Roman private and English public law there is arising throughout the world a new and composite state system, whose outer shell is English constitutional law, including jury trials in criminal cases, and whose interior code is Roman private law."[4]

It is a fact, however, that the Republic of Texas retained much of "the law as it aforetime was."

Having adopted the English common law as "the rule of decision," the Congress proceeded immediately by various statutory enactments to introduce important modifications of the common law. The Spanish community system of marital property rights was retained[5]; common-law rules as to succession were replaced by the civil-law rules[6]; the laws[7] exempting property, including the homestead, from forced sale were taken from Spanish prototypes[8]; the doctrines of the common law as to the estates arising

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[4] Address before the Texas Bar Association, *Proceedings* (1914) p. 178.
[5] Act, Jan. 20, 1840.
[6] Acts, Jan. 28, 1840, and Feb. 5, 1840.
[7] Acts, Jan. 26, 1839, and Dec. 22, 1840.
[8] Sayles, *Early Laws of Texas*, Introduction by Judge Willie, p. vi. Dillon, *Laws and Jurisprudence of England and America*, p. 360, writes: "The Republic of Texas passed the first homestead act in 1836. It was the gift of the infant Republic of Texas to the world." The act of Jan. 26, 1839, is the first Texas legislation on the subject of the homestead.

It was of this passage that the supreme court of the Republic said:

> "A hundred judges, in almost any conceivable case, might differ in some degree as to its interpretation and exact function."[11]

They suggested that the district judge try each cause as at law, and "if he cannot succeed in the effort, then ascend the woolsack and chancel it." Other later statutes of the Republic recognized the distinction between actions at law and in equity and added to the perplexity of the courts in their efforts to harmonize the civil and the common-law systems.[12]

This state of confusion called for fundamental treatment and the constitutional convention of 1845 supplied it. Upon the initiative of Hemphill and Rusk, the following provisions were written into the Constitution of Texas[13]:

> "The District Court shall have original jurisdiction . . . . of all suits, complaints and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, one hundred dollars exclusive of interest; and the said courts, or the judges thereof, shall have power to issue all writs necessary to enforce their own jurisdiction and give them a general superintendence and control over inferior jurisdictions."[14]

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[11] *Whiting v. Turley* (1842) Dallam (Tex.) 453.

[12] The act of Feb. 5, 1840, to regulate proceedings in civil suits: sec. 2, as to costs "in any cause whether at law or equity."

The act of Feb. 5, 1840, on admission to the bar: sec. 2, admittance "to practice law in all the courts of law and equity."

The act of Jan. 25, 1841, to empower the judges of the district courts to submit issues of fact to a jury "in chancery cases," sec. 7.

The act of Feb. 5, 1841, on limitations: sec. 9, to the effect that "no bill of review shall be granted to any decree pronounced in equity after two years."

The act of Feb. 5, 1841, on sales by "courts of chancery."

These instances bear out Rusk's statement made in the convention of 1845: "Now, sir, the legislature has brought all things into confusion. Immediately after the revolution it was determined that one court should have jurisdiction over all cases, rejecting the useless distinction between law and equity, which has since grown up." *Debates*, p. 274.

[13] Art. IV, sec. 10.

[14] The proposal to create "separate chancery courts" was voted down in the convention. *Journal of the Convention*, p. 191.

As to whether Texas or New York is entitled to the credit of being

Moreover the constitutional abolition of the distinction between law and equity in the administration of justice in the Texas courts is not limited in terms or by right interpretation to the mere abolition of the distinction between legal and equitable procedure.[19] Unfortunately, the opinions of the appellate courts still abound in loose references to "legal" titles and "equitable" titles (though the latter are said to be as "potent" as the former); the statutory action of trespass to try title is declared "essentially a legal action"; the plea of limitation under the statute is denominated a "legal defense," and so on. Over against these we get an occasional trenchant pronouncement like Hemphill's in *Bennett v. Spillars*:[20]

> "If the rules and principles arising from the antagonisms of the common law and equitable jurisdictions were thoroughly extirpated from the mind the provisions of legislation and the decisions and practice of the courts would become more harmonious and more in accordance with our system of judicial procedure."

The English common-law system has been further mutilated in Texas by many statutory enactments and by the adoption of important fractions of a rival system so that its inner harmony is destroyed. Moreover, the Texas courts have not hesitated to declare the rules of the common law inapplicable to our conditions and inconsistent with our usages.[21] Doubts have also recently arisen as to what is meant by the expression "the common law of England" in the Act of 1840 quoted above. In *The Indorsement Cases*,[22] decided in reconstruction days by a supreme court appointed by Major-General Griffin and commanding little respect in Texas, it was held that the law merchant constituted no part of the law of Texas because it was no part of the common law, i. e., the "ante-statute law of England." The Court of Criminal Appeals—the court of last resort in all criminal cases—by a vote

[19] *Hamilton v. Avery* (1857) 20 Tex. 612: "A subsisting equity, by the laws of this state that recognize no distinction between law and equity either in rights or their judicial preservation, confers a right of property by as strong a sanction as that which exists by a right purely legal."

[20] (1852) 7 Tex. 600, 602.

[21] *Stroud v. Springfield* (1866) 28 Tex. 649, 666; *Pace v. Potter* (1893) 85 Tex. 473; *Robertson v. State of Texas* (1911) 63 Ct. Cr. App. (Tex.) 216; *Clarendon Land Co. v. McClelland Bros.* (1893) 86 Tex. 179, 185.

[22] (1869) 31 Tex. 693.

to assume that one can get a correct or comprehensive view of the jurisprudence of a state from the opinions of appellate courts alone.[26]

Early Texas precedents were made under conditions that gave limited opportunity for the examination of even secondary authorities and called for large creative freedom in the courts.[27] Apart from Spanish authorities, Kent and Story, the decisions of the Louisiana courts were most frequently cited. The Louisiana civil code was admired and was freely drawn upon in the enactment of early laws. Its article 21 certainly reflected the viewpoint of the early Texas decisions:

> "In civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

We frequently find such expressions as these:

> "The *moral sense* of what is enjoined by *equity and good conscience* must be exceedingly obtuse to suppose that such flagrant *injustice* would receive the slightest countenance from any judicatory however organized."[28]

And:

> "It appears, then, that the liability of the defendant must result from the *facts of the case*, and not from the averments of the petition. If the possession of the defendant be wrongful, *in the popular acceptation of the term*, if it be inequitable and *unconscientious* . . . . he should *in all events* be responsible for the value of the property."[29]

I think we may safely say that apart from occasional lapses

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[26] Quite recently the writer had the privilege of attending a banquet given in honor of a young lawyer who had just been appointed to the district court bench. Three members of the appellate courts in their addresses urgently advised the young jurist to pay little attention to the refinements of the law, to decide the causes submitted to him upon the broad basis of conscience and his conception of right and wrong, and they assured him he would be seldom reversed.

[27] On Dec. 18, 1837, Messrs. Jack and Kaufman were appointed by the Texas Congress to draft a code of laws, but the Republic had no law books and they made no progress. On Jan. 23, 1839, $1,000.00 was appropriated for books for these commissioners. Whether they got the books or not is not known. They failed to submit a code.

[28] *Hunt v. Turner* (1853) 9 Tex. 385.

[29] *Porter v. Miller* (1852) 7 Tex. 468, 479, opinion by Hemphill.

men of profound knowledge in legal science should be chosen to administer justice in a system characterized by such elasticity and freedom as ours. The appellate courts of Texas are now turning out about 1,800 published opinions a year—no other state has such an output. We have had—and are still having—a rough, blundering, frontier sort of justice. There has been much talk the past two years of "law reform" in Texas, which means more new and poorly considered legislation. But the heart of our jurisprudence is sound. If the time ever comes when the voices of our law professors will be effectively heard and respected in the forums of justice and the halls of legislation in this country, we may have a more constructive part in preserving the true principles of the law and keeping its evolution in right lines. Meantime, in harmony with or in defiance to "authority," we have the inspiring task of shaping the professional ideals and standards of the next generation of lawyers.

GEORGE C. BUTTE

LAW SCHOOL, UNIVERSITY OF TEXAS.

MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 29, 1987

RE: Direct Action Against Insurer and TEX. R. CIV. P. 38(c)

The general common law rule is that no privity exists between an injured person and the tortfeasor's liability insurer; therefore the injured person has no right of action directly against the insurer and cannot join the insured and the liability insurer as co-defendants. In some states, statutes have been enacted enabling an injured party to proceed directly against the liability insurer. In one state, Florida, the court created a common law right of direct action; however, this common law right was promptly superseded by legislative action. No other state has followed the Florida Supreme Court.

The creation of a right of direct action against an insurer is not simply a matter of repealing the prohibition against joinder, TEX. R. CIV. P. 38(c), although clearly this would be the logical first step. The next impediment is the "no action" clause contained in the contract between insurer and insured. This clause prohibits legal action against the insurer until a judgment against the insured has been rendered. Here is the typical clause:

> LEGAL ACTION AGAINST US
>
> No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Liability Coverage, no legal action may be brought against us until:
>
> 1. We agree in writing that the covered person has an obligation to pay; or
> 2. The amount of that obligation has been finally determined by judgment after trial.
>
> No person or organization has any right under this policy to bring us into any action to determine the liability of a covered person.

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

SUPPLEMENTAL MEMORANDUM

TO: Judge Wallace

FROM: Chuck Lord

DATE: January 30, 1987

RE: Direct Action Against Insurer

As we anticipated, the fact that the Insurance Board is the agency directly responsible for the "no action" clause does not lighten the task this court must undertake to undo its effect. In Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970), we said that a rule or order promulgated by an administrative agency acting within its delegated authority is to be considered under the same principles as if it were a legislative act. In Lewis v. Jacksonville Building & Loan Assoc., 540 S.W.2d 307, 311 (Tex. 1976), Judge Denton wrote:

> Valid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation.

Attached are the statutes which delegate to the board the power to prescribe policy forms and endorsements.

Art. 5.35. Uniform Policies

The Board shall make, promulgate and establish uniform policies of insurance applicable to the various risks of this State, copies of which uniform policies shall be furnished each company now or hereafter doing business in this State. After such uniform policies shall have been established and promulgated and furnished the respective companies doing business in this State, such companies shall, within sixty (60) days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this State after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4888 (Acts 1913, p. 195), without substantive change.

Cross References

Condominium regime, insurance and use of proceeds, see Vernon's Ann.Civ.St. art. 1301a, §§ 19 to 21.

Lloyd's plan, applicability of this article, see art. 18.22.

Policies and applications, see art. 21.35.

Law Review Commentaries

Annual survey of Texas law:

Burden of proof. Harvey L. Davis, 22 Southwestern L.J. (Tex.) 30, 45 (1968).

Fire and casualty insurance. Harvey L. Davis, 23 Southwestern L.J. (Tex.) 130 (1969); Royal H. Brin, Jr., 26 Southwestern L.J. (Tex.) 174 (1972).

Insurance law. Royal H. Brin, Jr., 25 Southwestern L.J. (Tex.) 106 (1971).

Change of ownership within the meaning of the standard fire policy. 8 Baylor L. Rev. 213 (1956).

Fire insurance—community property—"sole ownership" clauses. 13 Southwestern L.J. (Tex.) 373 (1959).

Friendly and hostile fires. 33 Texas L. Rev. 954 (1955).

Recovery for damages caused by sonic boom under the aircraft provision. 12 Baylor L.Rev. 343 (1960).

Texas standard homeowners policy. Larry L. Gollaher, 24 Southwestern L.J. (Tex.) 636 (1970).

LIbrary References

Insurance ⇐133(1).

C.J.S. Insurance § 227 et seq.

Appleman, Insurance Law and Practice, §§ 10422, 10423.

Notes of Decisions

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Additional coverage 17

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In general 43

exclusively in board of insurance commissioners, and rates promulgated by commission are not subject to alteration by agreement, waiver, estoppel or any other device, and insurance carrier agrees to collect, and subscriber agrees to pay, premium rate prescribed by commission, and insurance carrier cannot charge more, nor bind itself to take less, than lawful rate. Id.

Contract to rebate, directly or indirectly, any part of workmen's compensation policy premium as prescribed by state board of insurance commissioners, is illegal and void, and is no defense in suit for full premium. Id.

Where compensation insurance rate is prescribed by one of state's regulatory bodies, it is the only rate parties to contract thereunder can contract for. Id.

Oral agreement under which insured was to be given guaranteed 20 per cent premium discount was invalid, and not available as defense to suit for premiums. Id.

The Board of Insurance Commissioners may not legally approve an insurance company's plan of operation and endorsement as requested and which required that the endorsement be attached to policies for risks of given size or greater than the given size and may not be attached to risks of less than the given size. Op.Atty.Gen.1940, No. 0-2049.

Art. 5.57. Uniform Policy

The Board shall prescribe a uniform policy for workmen's compensation insurance and no company or association shall thereafter use any other form in writing workmen's compensation insurance in this State, provided that any company or association may use any form of endorsement appropriate to its plan of operation, if such endorsement shall be first submitted to and approved by the Board, and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State.

Acts 1951, 52nd Leg., ch. 491.

Historical Note

Source:

Based on Vernon's Ann.Civ.St. art. 4913 (Acts 1923, p. 408), without substantive change.

Library References

Workers' Compensation ⇐1061.
C.J.S. Workmen's Compensation § 369.
Appleman, Insurance Law and Practice, §§ 10422 to 10424.

Notes of Decisions

1. Construction and application

Oral agreement by insurer to compensate insured for short rate premiums which previous insurer might charge because of cancellation of policy, made in contravention of written policy and accompanied by agreement of insured's president to buy large amount of stock of insurer, particu-

MEMORANDUM

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In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston, said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

discussion of its analysis is useful in providing an example of how direct action could be justified by the Texas Supreme Court.

The threshhold case is styled Shingleton v. Bussey, 223 So.2d 713 (Fla 1969). The court began its analysis by saying the state's Financial Responsibility law was evidence that members of the injured public were meant to be third party beneficiaries of the insurance contract because the insured acquired the insurance as a means of discharging his obligations that may accrue to members of the public arising out of his negligent operation of a motor vehicle. Viewed in this light the court held "there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus render motor vehicle liability insurance amenable to the third party beneficiary doctrine." Id. at 716. As noted earlier, Texas has already taken this step via the Childress case.

However, the Florida court recognized this was only the first step. They still had to decide when the injured party could exercise his right to sue on the contract. Id.

It recognized liability of the insured was a condition precedent to liability of the insurer, but it felt that this did not have the effect of postponing liability until a judgment had been rendered against the insured. Id. at 717.

The court felt that since insurance had always been heavily regulated by the state, it was not unreasonable to limit the effect of express contractual provisions where they collide with the public interest. Id. The court believed that "no action" clauses greatly hindered an injured person's right to an adequate "remedy by due course of law without denial or delay." Id. It recognized that a carrier could impose reasonable limits on its responsibilities to pay benefits, but it cannot unreasonably burden the injured person's rights. Id. The court then concluded that the insured and insurer had no right to contract away the injured party's rights through a "no action" clause. Id. at 718.

Furthermore, the court recognized the argument that juries are more likely to find negligence or enlarge damages when an affluent institution has to bear the loss, but the court felt that a stage has "been reached where juries are more mature." Id. It also felt that candid admissions of existence and policy limits of insurance would benefit insurers by limiting their policy judgment payments because the opposite approach "may often mislead juries to think insurance coverage is greater than it is."

As additional reasons for authorizing direct action, the court cited the fact that the rules of joinder were adopted with the purpose of avoiding multiplicity of suits. It saw no reason why insurance companies should be exempt from the law in that respect.

possible that our legislature would follow the Florida legislature's course of action. Insurance lobbies seem to be strong and powerful. Unless they really believe that direct action is in their best interests, it is a good bet that they would be on the doorsteps of the capitol immediately following an adverse decision in this regard.

C-5027

MEMORANDUM

TO: Judge Robertson

FROM: Eddie Molter

DATE: October 30, 1986

RE: Direct Action Against Insurer

A. Background on Texas Law

Early Texas cases held that an insurer might be joined as a defendant in the case of a liability policy. American Automobile Insurance Co. v. Streeve, 218 S.W. 534, 535 (Tex. Civ. App. - San Antonio 1920, writ ref'd) (following the rule that joinder is proper when the causes of action grow out of the same transaction and rejecting the contention that joinder resulted in an improper reference to insurance); Monzingo v. Jones, 34 S.W.2d 662, 663-64 (Tex. Civ. App. - Beaumont 1931, no writ) (same but also indicating that policy language that insurer was not liable until after judgment has been awarded against insured is not inconsistent with joinder). However, Ray v. Moxon, 56 S.W.2d 469 (Tex. Civ. App. - Amarillo 1933) aff'd 81 S.W.2d 488 (Tex. Comm'n App. 1935, opinion adopted) started a trend toward holding that "no action" clauses prevent joinder or direct action against the insurer prior to judgment against the insured. See Kuntz v. Spence, 67 S.W.2d 254 (Tex. Comm'n App. 1934, holding approved); Grasso v. Cannon, 81 S.W.2d 485 (Tex. Comm'n App. 1935, opinion adopted); American Fidelity & Casualty Co. v. McClendon, 81 S.W.2d 493 (Tex. Comm'n App. 1935, opinion adopted); Seaton v. Pickens, 87 S.W.2d 709 (Tex. Comm'n App. 1935, opinion adopted).

In Kuntz, 67 S.W.2d at 255, the court, in talking about a no action clause, said that it prevents the casualty company from being bound

> as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained.... [I]t fully guards against such suit. If there is a reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy.

The court also gave another reason for prohibiting direct action. It said:

Fidelity, 81 S.W.2d at 495; Elliot v. Lester, 126 S.W.2d 756, 758 (Tex. Civ. App. - Dallas 1939, no writ) ("The procedure, to the effect that the insurance carriers be not directly sued or mentioned in the pleadings and proof, obviously, was for the beneficial convenience of the insurance companies.")

In addition, the rules of civil procedure prohibit joinder of a liability or indemnity insurance company unless the company is by statute or contract directly liable to the injured party. Tex. R. Civ. P., Rules 50(b), 97(f). See also Webster v. Isbell, 100 S.W.2d 350 (Tex. 1937) (holding that insurer may not be joined unless the injured party shows he was made a beneficiary of the insurance contract by statute or the terms of the policy). Of course, such a rule leaves open an avenue for joinder in the case of required policies if the court holds that the policy provides for direct liability.

B. Compulsory Insurance and Direct Action in Texas

"When ... insurance is required by a statute or ordinance, the protection of the insured is not the primary objective of the insurance. Even in the absence of specific language securing to injured persons direct rights under the policy, there is inherent in such a policy an inference of a compulsory undertaking on the part of the insurer to answer in damages to the injured person." Annot., 20 A.L.R.2d 1097 (1951). See also Dairyland County Mutual Insurance Company of Texas v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) ("There is no question in our minds that the compulsory insurance requirement of the Texas motor vehicle safety law implies that all potential claimants resulting from automobile accidents are intended as beneficiaries of the statutorily required automobile liability coverage.")

In Texas, a determination of whether a claimant can bring a direct action under a compulsory policy has depended in large part upon the language of the statute or ordinance making insurance compulsory. For example, in Scroggs v. Morgan, 107 S.W.2d 911 (Tex. Civ. App. - Beaumont 1937) rev'd on other grounds 130 S.W.2d 283, an ordinance established mandatory liability insurance for taxis with a direct action against the insurer. The court rejected the insurer's claim that it should not be joined because juries are more likely to award verdicts against insurance companies because the ordinance provided otherwise. However, the ordinance establishing mandatory insurance for taxis in the City of Houston said that insurers "shall pay all final judgments" rendered against the insured. Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 697 (Tex. Comm'n App. 1940, opinion adopted). The court held that this language precluded any cause of action against the insurer until an obligation arose from a rendition of a final judgment against the insured. Id. See also Grasso, 81 S.W.2d 842 (same in regards to art. 911b, § 13); American Fidelity, 81 S.W.2d 493 (same in regards to art. 911a, § 11).

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